(13)

No. 87-2127-ADX
Status: GRANTED

Docketed:
June 28, 1988

Title: American Foreign Service Association, et al., Appellants
v.
Steven Garfinkel, Director, Information Security Oversight Office, et al.

Court: United States District Court for the District of Columbia

Counsel for appellant: Goldman,Patti A.

Counsel for appellee: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 28 1988	G	Statement as to jurisdiction filed.
3	Jul 20 1988		Order extending time to file response to jurisdictional statement until August 29, 1988.
4	Aug 22 1988		Order further extending time to file response to jurisdictional statement until September 28, 1988.
5	Sep 28 1988		Order further extending time to file response to jurisdictional statement until October 5, 1988.
6	Oct 5 1988		DISTRIBUTED. October 28, 1988
7	Oct 5 1988	X	Motion of appellee United States to affirm filed.
8	Oct 17 1988	X	Reply brief of appellant American Foreign Service Assn. filed.
9	Oct 31 1988		PROBABLE JURISDICTION NOTED.
			**********
11	Nov 4 1988		Order extending time to file brief of appellant on the merits until December 29, 1988.
12	Nov 10 1988		Record filed.
		*	Certified copy of original record on appeal received.
13	Dec 29 1988		Brief amicus curiae of Government Accountability Project filed.
14	Dec 29 1988		Brief amicus curiae of AFL-CIO filed.
15	Dec 29 1988		Joint appendix filed.
16	Dec 29 1988		Brief of appellants American Foreign Service Association, et al. filed.
17	Dec 29 1988		Brief amicus curiae of ACLU filed.
20	Jan 31 1989		Order extending time to file brief of appellee on the merits until February 16, 1989.
21	Feb 3 1989		SET FOR ARGUMENT MONDAY, MARCH 20, 1989. (2ND CASE)
22	Feb 8 1989	G	Motion of United States Senate for leave to file a brief as amicus curiae filed.
23	Feb 15 1989	G	Motion of Speaker and Leadership Group for leave to file a brief as amici curiae filed.
24	Feb 16 1989		Brief of appellee Steven Garfinckel filed.
27	Feb 24 1989		CIRCULATED.
25	Feb 27 1989		Motion of United States Senate for leave to file a brief as amicus curiae GRANTED.
26	Feb 27 1989		Motion of Speaker and Leadership Group for leave to file a brief as amici curiae GRANTED.
28	Mar 7 1989	X	Reply brief of appellants American For. Serv., etc.,et al. filed.
29	Mar 20 1989		ARGUED.

87-2127 (1)

No. 87-

Supreme Court, U.S.
FILED
JUN 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMERICAN FOREIGN SERVICE ASSOCIATION, REPRESENTATIVE BARBARA BOXER, REPRESENTATIVE JACK BROOKS, SENATOR CHARLES GRASSLEY, SENATOR WILLIAM PROXMIRE, SENATOR DAVID PRYOR, REPRESENTATIVE PAT SCHROEDER, and REPRESENTATIVE GERRY SIKORSKI,

Appellants,

v.

STEVEN GARFINKEL, Director, Information Security Oversight Office, WILLIAM H. WEBSTER, Director of Central Intelligence, and GEORGE P. SHULTZ, Secretary of State,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED*

1. Did the district court err in declaring Section 630 of the Continuing Resolution for Fiscal Year 1988 unconstitutional on its face, under the doctrine of separation of powers, on the theory that Congress has no authority to enact legislation that regulates in any way the President's power to limit the disclosure of national security information?

2. Did the district court err in holding that the congressional plaintiffs do not have standing to seek enforcement of Section 630 where Members of Congress are among the intended beneficiaries of its provisions, which protect the right of Executive Branch employees to disclose national security information to Members of Congress?

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*There are no parties to the district court proceeding other than those listed in the caption of this case. In the district court, this case was consolidated with *National Federation of Federal Employees v. United States, Terence C. Golden, Steven Garfinkel, Frank Carlucci, John O. Marsh, Jr., Edward C. Aldridge, Jr., and James H. Webb, Jr.*, No. 87-2284-OG, and with *American Federation of Government Employees, AFL-CIO, Jim Stinchcomb, James Douglas and Louis C. Brase v. Steven Garfinkel, Terence C. Golden, Colin L. Powell, William Webster, Frank Carlucci, Edward C. Aldridge, John O. Marsh, Jr., James H. Webb, Jr. and United States*, No. 87-2412-OG. Those cases contain other claims, which are still pending in the district court, and thus the dismissal of the claims that are common to all three cases did not finally dispose of the other cases.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION AND ORDER BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING PLENARY REVIEW 11

CONCLUSION 20

APPENDIX A:
Opinion of the United States District Court for the District of Columbia 1a

APPENDIX B:
Order of the United States District Court for the District of Columbia 37a

APPENDIX C:
Notice of Appeal to the Supreme Court of the United States 39a

TABLE OF AUTHORITIES

Cases: Page

American Federation of Government Employees, AFL-CIO v. Steven Garfinkel, No. 87-2412-OG (D.D.C. filed September 1, 1987) 6

Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948) 15

Department of the Navy v. Egan, ___ U.S. ___, 108 S. Ct. 818 (1988) 17

Donovan v. Richland County Association for Retarded Citizens, 454 U.S. 389 (1982) 2

Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) 16, 17

National Federation of Federal Employees v. United States, No. 87-2284-OG (D.D.C. filed August 17, 1987) 6

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 14, 15, 18

United States v. American Telephone & Telegraph Co., 567 F.2d 121 (D.C. Cir. 1977) 16

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 17

Webster v. Doe, 56 U.S.L.W. 4568 (U.S. June 15, 1988) 17

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 16, 17

Constitution:

Article I 2
Article II 16

Page

Statutes:

5 U.S.C. § 7211 18

18 U.S.C. § 798(c) 19

28 U.S.C. § 1252 ..... 2, 19

28 U.S.C. § 1292 ..... 2, 19

50 U.S.C. §§ 413-415 18

50 U.S.C. § 425 18

Civil Service Reform Act,
5 U.S.C. § 2302 (b) 4, 19

Federal Records Act,
44 U.S.C. §§ 2201-2207 18

Freedom of Information Act,
5 U.S.C. § 552 18

Presidential Recordings & Materials Preservation Act,
44 U.S.C. § 2111 note 4

Privacy Act,
5 U.S.C. § 552a 18

Public L. No. 100-202, Employee Disclosure Agreements,
§ 630, 1988 U.S. Code Cong. & Ad. News
(101 Stat.) 1329 (Dec. 22, 1987) ..... *passim*

Other Authorities:

Classified Information Nondisclosure Agreements:
Hearing Before the Subcomm. on Human Resources
of the House Comm. on Post Office and Civil Service,
100th Cong., 1st Sess (Oct. 15, 1987) 5

Page

Executive Order 12,356, 3 C.F.R. 166 (1982) 12, 13

General Accounting Office, Information and Personnel Security: Data on Employees Affected by Federal Security Programs (Sept. 1986) 5

133 Cong. Rec. H11,999 (Dec. 21, 1987) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-

AMERICAN FOREIGN SERVICE ASSOCIATION, REPRESENTATIVE BARBARA BOXER, REPRESENTATIVE JACK BROOKS, SENATOR CHARLES GRASSLEY, SENATOR WILLIAM PROXMIRE, SENATOR DAVID PRYOR, REPRESENTATIVE PAT SCHROEDER, and REPRESENTATIVE GERRY SIKORSKI,

Appellants,

v.

STEVEN GARFINKEL, Director, Information Security Oversight Office, WILLIAM H. WEBSTER, Director of Central Intelligence, and GEORGE P. SHULTZ, Secretary of State,

Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION AND ORDER BELOW

The opinion and order of the United States District Court for the District of Columbia, which are not yet officially reported, are reproduced in an appendix to this jurisdictional statement (App. 1a-38a).

JURISDICTION OF THIS COURT

This is an appeal from a final order of the United States District Court for the District of Columbia, entered on May 27, 1988, holding an Act of Congress unconstitutional. App. 37a-38a. A notice of appeal was filed on June 3, 1988, in the

United States District Court for the District of Columbia. App. 39a-41a. The district court had jurisdiction under 28 U.S.C. § 1331. Because the district court declared an Act of Congress unconstitutional in a civil action to which three officers of the United States were parties, this Court has jurisdiction under 28 US.C. § 1252, exclusive of appellate review in the court of appeals that is normally available under 28 U.S.C. § 1292. *See Donovan v. Richland County Association for Retarded Citizens*, 454 U.S. 389 (1982) (per curiam).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I of the United States Constitution provides in pertinent part:

> Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States . . ..
>
> Section 8. The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . .;
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies . . .;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> . . . And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

> Section 9. . . .
>
> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ..
>
> Article II provides in pertinent part:
>
> Section 1. The executive Power shall be vested in a President of the United States of America. . . .
>
> Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, ...
>
> Section 3. . . .he shall take Care that the Laws be faithfully executed . . ..

Section 630 of the Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202, 100th Cong., 1st Sess. (Dec. 22, 1987), 1988 U.S. Code Cong. & Ad. News (101 Stat.) 1329, provides:

> No funds appropriated in this or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:
>
> (1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination;
>
> (2) contains the term "classifiable";
>
> (3) directly or indirectly obstructs, by requirement of prior written authorization, limitation

> of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;
>
> (4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;
>
> (5) imposes any obligations or invokes any remedies inconsistent with statutory law:

Provided, That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)-(5) of this section.

STATEMENT OF THE CASE

This appeal seeks reversal of a district court ruling that Congress violated the doctrine of separation of powers when it enacted a law that placed certain limits on the President's authority to regulate disclosure of national security information. The facts giving rise to this case are neither extensive nor in dispute, especially in light of the district court's declaration that Section 630 is unconstitutional on its face and in its entirety.

In March 1983, President Reagan expanded the prior policy of requiring federal employees in particularly sensitive positions to sign nondisclosure agreements by ordering that "[a]ll persons with authorized access to classified information . . . [must] sign a nondisclosure agreement as a condition of access." National Security Decision Directive-84 ¶ 1(a). To

carry out this requirement, the Administration developed Standard Form 189 ("SF 189"), which federal employees had to sign in order to obtain access to classified information, and Standard Form 4193 ("SF 4193"), which federal employees had to sign in order to have access to that segment of classified information that is related to or derived from intelligence sources and methods and is known as Sensitive Compartmented Information ("SCI").

Both of these forms bind federal employees never to divulge classified or "classifiable" information without prior authorization from the agency that employs them. The Administration contends that this lifelong prohibition extends to congressional disclosures, even where the Member of Congress is otherwise entitled to have access to the information. Employees who have access to classified information must sign secrecy agreements or risk losing their security clearances and, in many cases, their jobs, which require such clearances. Violations of these agreements are punishable by a range of sanctions, including denial or revocation of security clearances and consequential job loss. Of the almost two and a half million federal employees who are cleared for access to classified information, more than 1.7 million had been compelled to sign SF 189 as of October 1987. *Classified Information Nondisclosure Agreements: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess 62, 67 (Oct. 15, 1987)(Statement of Steven Garfinkel, Director, Information Security Oversight Office). In addition, more than 200,000 federal employees outside the Central Intelligence Agency and the National Security Agency had signed SF 4193 as of September 1986. General Accounting Office, Information and Personnel Security: Data on Employees Affected by Federal Security Programs 3 (Sept. 1986).

The forms' restrictions on the dissemination of "classifiable" information and their limitations on disclosures to Congress have been extremely controversial. Many Members of Congress, including the congressional appellants, objected to the use of the term "classifiable" because it both impinges on the free speech rights of federal employees and allows after-the-fact classification of information in order to punish whistleblowers for making disclosures that embarrass their superiors. The Members also protested the applicability of the nondisclosure forms to congressional disclosures because they cut off access to both classified and "classifiable" information that Congress needs to perform its duties, but which executive officials may prefer to keep hidden. In the summer of 1987, several federal employees and their union representatives filed two separate lawsuits challenging the standard forms primarily on constitutional grounds. *National Federation of Federal Employees v. United States*, No. 87-2284-OG (D.D.C. filed August 17, 1987); *American Federation of Government Employees v. Garfinkel*, No. 87-2412-OG (D.D.C. filed September 1, 1987).

Rather than await the outcome of those lawsuits, Congress enacted legislation prohibiting the use of funds during Fiscal Year 1988 to implement the existing forms (or others like them) or to enforce certain of their provisions. Continuing Resolution for Fiscal Year 1988, Public L. No. 100-202, Employee Disclosure Agreements, § 630, 100th Cong., 1st Sess. (1987), 1988 U.S. Code Cong. & Ad. News (101 Stat.) 1329. Section 630, which became law on December 22, 1987, principally limits two aspects of the Administration's nondisclosure agreements. The first two subsections of Section 630 forbid the use of the term "classifiable" and restrict nondisclosure agreements to information that is specifically marked as classified or that the employee knows is either classified or

in the process of a classification determination. The next two subsections provide that nondisclosure agreements may not, by a requirement of prior written authorization or otherwise, obstruct the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of Congress or the right of Congress to obtain Executive Branch information under such rules and procedures. The final subsection forbids nondisclosure agreements from imposing obligations or remedies that are inconsistent with statutory law, such as whistleblower protections, and overlaps to a considerable degree with Section 630's other provisions.

Section 630 prohibits the Executive Branch from spending any funds during Fiscal Year 1988 to implement or execute SF 189 and SF 4193, as well any other nondisclosure agreements that contain the offending provisions. However, Section 630 expressly allows enforcement of those aspects of nondisclosure agreements that do not fall within its specific prohibitions.

After the President signed the Continuing Resolution, appellee Steven Garfinkel, the Director of the Information Security Oversight Office ("ISOO"), which is responsible for overseeing the implementation and enforcement of SF 189, undertook certain steps that resulted in partial compliance with Section 630. By letter dated December 29, 1987, he directed agencies to cease requiring employees to sign SF 189 agreements until further notice. Subsequently, he directed agencies to take reasonable steps to notify employees that SF 189 agreements signed after December 22, 1987 are voidable at the behest of the employee, but he did not require agencies to void post-December 22 agreements in the absence of a request from the employee, or to notify employees that certain aspects of pre-December 22 agreements are not enforceable during Fiscal Year 1988.

Appellee Webster, who is the Director of Central Intelligence and is responsible for the protection of SCI, did far less to comply with Section 630. He instructed agencies to continue using SF 4193 and other forms that contain the provisions banned by Section 630, but to attach an addendum that consists of the following sentence:

> The obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with the section entitled "Employee Disclosure Agreements" contained in P.L. 100-202, Continuing Appropriations for Fiscal Year 1988, 22 December 1987, and other applicable law.

The addendum does not identify the section setting forth the restrictions, despite the fact that Section 630 occupies less than one page of a 450-page bill that has no index to assist in locating a section on a particular subject matter. Pub. L. No. 100-202, 1988 U.S. Code Cong. & Ad. News (101 Stat.) 1329. Nor did defendant Webster direct agencies to notify employees of the terms of Section 630 or its effect on previously executed forms containing the now-prohibited provisions.

On February 18, 1988, appellant American Foreign Service Association ("AFSA"), a professional and labor association of foreign service employees whose members have been required to sign SF 4193 both before and after December 22, 1987, and seven Members of Congress, who depend on access to information furnished by federal employees in order to carry out their duties (the "congressional appellants"), filed this lawsuit to compel appellees Garfinkel, Webster, and Secretary of State George P. Shultz to comply with Section 630. Along with the complaint, appellants filed a motion for a preliminary injunction asking the Court to enjoin appellees from requiring federal employees to sign the prohibited nondisclosure agreements during the remainder of this Fiscal Year.

They also asked the Court to require appellees to treat all agreements signed on or after December 22, 1987 as void and to order appellees to notify the employees who signed such agreements that they are void and unenforceable. Subsequently, appellees filed a motion for summary judgment asking the Court to require that all federal employees who signed the standard forms before December 22, 1987 also be notified of the limitations that Section 630 imposes on the enforcement of such forms. After the plaintiffs in the earlier challenges to the constitutionality of the standard forms amended their complaints to add a challenge based on Section 630, and joined in appellants' motions for a preliminary injunction and for summary judgment, the district court ordered that the cases be consolidated.

In their oppositions to these motions, appellees objected to the standing of all the plaintiffs and pointed to the steps that they had taken to comply with Section 630. Recognizing, however, that their actions likely fell short of full compliance, appellees challenged the constitutionality of Section 630 under the doctrine of separation of powers. To support their claims, appellees submitted an affidavit from appellee Webster asserting that disclosures of SCI may harm national security, and that nondisclosure agreements generally help prevent such disclosures. However, neither that affidavit nor any other evidence in the record even asserts that any of the provisions that are banned by Section 630 is necessary to prevent the disclosure of SCI or that their deletion will render nondisclosure agreements ineffective.[1]

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[1]While the case was pending in the district court, appellee Webster approved Standard Form 4355 ("SF 4355") to replace SF 4193. Although SF 4355 does not contain the term "classifiable," and thus complies with one of Section 630's requirements, it contains other provisions that are banned by Section 630.

In a memorandum opinion issued on May 27, 1988, Senior District Judge Oliver Gasch found that appellant AFSA and the unions and individual plaintiffs in the other actions have standing to seek compliance with Section 630, but that the congressional appellants do not. On the merits, the court held that Section 630 is unconstitutional under separation of powers principles. In its constitutional ruling, which occupies less than six typed pages, the court indicated that it would likely find that appellees had violated Section 630. App. 22a-23a & n.16; *id.* 22a-27a. It also recognized that judicial consideration of Congress' role in regulating national security information has been rare, *id.* 25a, and that "[n]either political branch is expressly charged by the Constitution with regulating accumulation of or access to national security information." *Id.* Nonetheless, it concluded that Congress' historical role has been limited to "facilitat[ing] secrecy with appropriate criminal and civil sanctions," and seeking information by subpoena or cooperation, and that "Section 630 departs from history and threatens the balance struck by time and constitutional implication between the pervasive importance of strict protection of national security information and Congress' institutional need for that information." *Id.* 26a. Then, without citing a single case in which a comparable statute had been found to be beyond Congress' powers, the court declared Section 630 unconstitutional on its face and dismissed the complaint on the ground that Section 630 "impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations." *Id.* 27a.[2]

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[2]The fact that Section 630 is scheduled to expire on September 30, 1988 does not render this appeal moot for several reasons. First, Section 630 may be continued as part of a Continuing Resolution for Fiscal Year 1989. Congress may specifically continue Section 630, or it may, as it has often done in recent years, incorporate the restrictions from the prior year in interim continuing resolutions. Thus, this case cannot conceivably be moot

REASONS FOR GRANTING PLENARY REVIEW.[3]

In declaring Section 630 unconstitutional on its face, the district court issued a sweeping decision that parts company with accepted separation of powers analysis and places a cloud over virtually all other legislative enactments pertaining to the dissemination of national security information. The district court's ruling strikes down all provisions of Section 630 in every conceivable manifestation. It does this in extremely broad language that essentially precludes Congress from placing any restrictions on the Executive Branch's power to limit the disclosure of national security information, even if such information has not been classified under the President's own classification rules. Moreover, the district court reached this quite startling result without any evidence that the actual operation of Section 630, in fact, impairs the President's ability to protect national security information. A review of Section 630's prohibitions demonstrates that the district court's ruling is completely unsupported and that review by this Court is essential.

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until September 30, 1988, or more realistically, until the appropriations process for Fiscal Year 1989 has run its course. Second, Congress is considering permanent legislation to deal with this issue in a manner similar to that set forth in Section 630, which would take effect at the end of this Fiscal Year. Finally, and most importantly, even if Section 630 expires without other legislation taking its place, the employees who signed offending nondisclosure agreements after December 22, 1987 still have a live claim that such agreements are illegal and void.

[3]The following discussion pertains to appellants' first question presented on the separation of powers ruling below. Appellants believe that the Court can decide the separation of powers issue without deciding the other question presented, which pertains to congressional standing. Although appellants do not seek plenary review of the congressional standing ruling on its own, they have included it in this appeal in the event that the Court concludes that it must decide whether the congressional appellants have standing in order to reach the merits of the separation of powers question.

A major feature of Section 630, which the district court completely neglected to mention in its separation of powers discussion, prohibits the use of the term "classifiable" and allows nondisclosure agreements to cover only information that is marked classified, that the employee knows is classified, or that the employee knows is in the process of a classification determination. These restrictions ensure that employees will not be punished unless they disclose information that they know may not be disclosed, and that agencies may not classify information after-the fact in order to punish whistleblowers who reveal embarrassing information.

Not only is there no evidence that any harm will flow from this limitation, but appellee Webster's deletion of the term "classifiable" from the most recent SCI agreement demonstrates that national security interests do not compel the use of that term. Similarly, the National Security Council, which deals with some of the nation's most sensitive information, modified SF 4193 by deleting the term "classifiable" and incorporating verbatim Section 630's other restrictions on the information that may be covered by a nondisclosure agreement. And appellee Garfinkel directed agencies to stop using forms that violate this and other aspects of Section 630, without any suggestion of any harm to national security.

Moreover, because the President's own Executive Order governing classification extends only to classified information, it is hard to imagine how excluding "classifiable" information from the scope of nondisclosure agreements intrudes on presidential authority over national security information. Executive Order 12,356, 3 C.F.R. 166 (1982). Indeed, subsection 1 of Section 630 allows nondisclosure agreements to go beyond the Executive Order to cover (1) information that is not classified, if the employee knows that the information is in the process of being classified, and (2) information that is not

marked as classified, as required by Executive Order 12,356, § 1.5, if the employee knows that it is classified. Thus, Congress has given the Executive Branch more leeway than that afforded by the President's own classification system.

The second major goal of Section 630 is to protect Congress' access to Executive Branch information, both classified and "classifiable." Congress concluded that the requirement contained in SF 189 and SF 4193 — that employees must obtain prior authorization from their superiors before making disclosures to relevant Members of Congress — threatens to cut off an important source of information for Congress. Accordingly, Congress prohibited nondisclosure agreements from interfering with an employee's right to communicate with Members of Congress in a secure manner as provided by the rules and procedures of Congress.

Neither appellees nor the district court cited any deficiencies in Congress' procedures for maintaining the security of classified information as a basis for finding Section 630 unconstitutional. Instead, as it did for the other aspects of Section 630, the district court simply declared that the congressional disclosure protections were unconstitutional on their face, without any finding of harm to national security or any actual impairment of presidential authority.

In some respects, the district court's declaration of unconstitutionality is most troubling as it applies to the final requirement of Section 630. Subsection 5 prohibits nondisclosure agreements from imposing any obligations or invoking any remedies that are "inconsistent with statutory law." Contrary to the district court's view, this requirement does not, by itself or in combination with the other provisions of Section 630, "permit the President to ensure the secrecy of national security information only by those means authorized by Congress."

App. 27a. Rather, it merely precludes the President from acting in direct contravention of statutes that Congress has duly enacted, generally with the assent of the President.

The district court found this requirement to be overly intrusive without reference to any statutes that are implicated by this provision or any discussion of how such statutes might impair the President's constitutional responsibilities. While there might conceivably be some such statutory right or limitation that intrudes on presidential authority over national security information, neither appellees nor the district court identified any such measure. The core statutory provisions covered by this requirement of Section 630, and which, by implication, are also unconstitutional under the district court's ruling, are the whistleblower protection provisions of the Civil Service Reform Act, 5 U.S.C. § 2302(b)(8). *See* 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987) (floor statement of Representative Jack Brooks, a sponsor of Section 630). Those provisions make it illegal to retaliate against federal employees for disclosing information about government waste and wrongdoing, as long as the employee does not publicly disclose classified information, and they protect employees who disclose such information to Congress, even where the information is classified. Not only did the district court fail to mention these whistleblower protections, but, under its ruling, these provisions, like Section 630, would violate the doctrine of separation of powers.

Aside from lacking support on its own terms, the decision below also conflicts with decisions of this Court, particularly *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). The Court there rejected a similar claim that the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2111 note, violated separation of powers principles on its face, because it regulated the disposition of presiden-

tial records. In rejecting this claim, the Court set forth the applicable test:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

433 U.S. at 443 (citations omitted).

The lower court did not even purport to apply this test. If it had, it would have been compelled to conclude that Section 630 does not, either on its face or in the vast majority of its applications, prevent the President from carrying out his constitutionally assigned functions since appellees made no showing of any such impairment or of any need for the provisions that are prohibited by Section 630. Indeed, by complying with some of its provisions, appellees have demonstrated quite the opposite.

Instead of identifying some impairment of the President's ability to protect national security information, the district court relied on a broad assertion of presidential authority over national security information, and it completely ignored Congress' constitutional role in national security and appropriations matters. As this Court has observed, authority over national security matters is "confided by our Constitution to the political departments of the government, Executive and Legislative." *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948). And as the D.C. Circuit has explained:

> While the Constitution assigns to the President a number of powers relating to national security, including the function of commander in chief and the power to make treaties and appoint Ambassadors, it confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the case of the Senate, consent to treaties and the appointment of Ambassadors.

United States v. American Telephone & Telegraph Co., 567 F.2d 121, 128 (D.C. Cir. 1977). Moreover, Congress has an additional check on executive actions in national security affairs, as in all others, through the power of the purse. U.S. Const., Art. I, § 9.

The district court also sidestepped the cases in which this Court has struck down executive actions that were founded on claims of national security, because they contravened statutes passed by Congress. As Justice Jackson observed when the Korean War was offered as the rationale for the President's seizure of the steel mills, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . .." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Likewise, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), the owners of a ship seized during an undeclared war with France sought damages from the Navy official who seized the ship because his actions were in violation of the statute governing such seizures. The Court ruled that the owners could collect damages, even though the official's actions were consistent with the orders of the Secretary of the Navy, because the Executive Branch cannot give orders that contravene a statute, even in the context of military operations. The district court did not even try to ex-

plain why Congress may restrict the President's authority to safeguard weapons production in wartime or to establish rules governing military action, as in *Youngstown* and *Little*, but may not place far more discrete limitations on the Executive Branch's peacetime use of nondisclosure agreements.

The other decisions of this Court cited below did not involve a clash between an Act of Congress and actions of the President involving national security affairs. Instead, they involved judicial deference to executive actions in national security matters when the President was acting pursuant to an express or implied congressional authorization. Thus, this Term, in *Department of the Navy v. Egan*, ____ U.S. ____, 108 S. Ct. 818 (1988), the Court stated: "***unless Congress specifically has provided otherwise***, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 825 (empnasis added). Similarly, in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the Court upheld a congressional delegation to allow the President to forbid certain arms sales. In contrast to the President's attack on Section 630, the President in *CurtissWright* relied on a statute for his authority and partially defended Congress' delegation of such authority on the basis of his own powers in foreign affairs. Thus, contrary to the district court's view, the decisions of this Court do not stand for the proposition that the Executive Branch has unlimited authority over national security matters in the absence of congressional authorization, and certainly not in the face of a congressional prohibition. *See also Webster v. Doe*, 56 U.S.L.W. 4568 (U.S. June 15, 1988), for a further holding in which the Court rejected the total supremacy of the Executive Branch over all matters relating to national security.

The district court's primary rationale appears to be its conclusion that Section 630 departs from Congress' traditional

role in the regulation of national security information. According to the district court, Congress has, in the past, done no more than facilitate secrecy by authorizing criminal and civil sanctions, and therefore it lacks the power to do more than that. App. 26a. Aside from the fact that a statute is not unconstitutional simply because Congess has not enacted such legislation in the past, Congress has long played a prominent role in this area that extends well beyond authorizing sanctions. As this Court recognized in *Nixon v. Administrator of General Services*, "there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch," 433 U.S. at 445, including several statutes, such as the Freedom of Information Act, 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, and the Federal Records Act, 44 U.S.C. §§ 2201-2207, that place limits on executive control over national security information. Congress has also passed statutes that protect its access to Executive Branch information, *see, e.g.*, 5 U.S.C. § 7211 (protecting federal employees' right to furnish information to Congress); 50 U.S.C. §§ 413-415 (requiring Executive Branch to provide intelligence oversight information to certain congressional committees), and it has ensured that other statutes cannot be used to deny such access, *see, e.g.*, 5 U.S.C. § 552(c)(Freedom of Information Act "is not authority to withhold information from Congress"); 50 U.S.C. § 425 (Intelligence Identities Protection Act may not be construed as authority to withhold information from Congress or its committees).

Moreover, in authorizing civil and criminal sanctions, Congress has not simply delegated unconstrained authority to the Executive Branch to punish disclosures of sensitive information. Rather, in defining the activities that may be subject to punishment, Congress has specifically designated activities for which sanctions may *not* be imposed. Thus, in making it a crime

to disclose certain sensitive information, Congress stated that the statute does not "prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of [Congress]." 18 U.S.C. § 798(c). Similarly, although the whistleblower protection provisions of the Civil Service Reform Act prohibit retaliation against whistleblowers for making public disclosures only if the information is unclassified, they protect congressional disclosures of both classified and unclassified information. 5 U.S.C. § 2302(b). Therefore, even if past practice were the constitutional litmus test, Section 630 falls well within Congress' prior regulation of the circumstances in which disclosures of national security information may be punished.

In sum, this Court's review is necessary both because the district court's ruling is unfounded in law and because it raises questions of grave importance that go to the heart of the respective roles of the two political branches over national security information. By declaring Section 630 facially unconstitutional, the district court not only cast a cloud over Section 630, but also over all statutes regulating the dissemination of national security information. Such a ruling, by a single district judge, is too important to go unreviewed, and 28 U.S.C. §§ 1252 and 1292 leave appellants no choice but to seek review in this Court.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
Plaintiff,
v.
UNITED STATES OF AMERICA, *et al.*,
Defendants.

Civil Action No. 87-2284-OG

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Plaintiffs,
v.
STEVEN GARFINKEL, *et al.*,
Defendants.

Civil Action No. 87-2412-OG

AMERICAN FOREIGN SERVICE ASSOCIATION, *et al.*,
Plaintiffs,
v.
STEVEN GARFINKEL, *et al.*,
Defendants.

Civil Action No. 88-0440-OG

COUNSEL: For plaintiffs in C.A. 87-2284: Bruce Heppen, National Federation of Federal Employees, Washington, D.C.

For plaintiffs in C.A. 87-2412: Stuart Kirsch, American Federation of Government Employees, Atlanta, Georgia and Joseph Kennedy, Government Accountability Project, Washington, D.C.

For plaintiffs in C.A. 88-0440: Patti Goldman, Public Citizen Litigation Group, Washington, D.C.

For defendants: Robert Irvin, Department of Justice, Washington, D.C.

MEMORANDUM

On at least two fronts, plaintiffs in these consolidated cases[1] challenge the lawfulness and constitutionality of various nondisclosure agreements drafted by the Executive Branch to protect the secrecy of classified information. These agreements are embodied in forms drafted by the Information Security Oversight Office ("ISOO"), the Director of Central Intelligence ("DCI"), and the Department of Defense ("DOD"). The forms were prepared as part of a longstanding presidential scheme for restricting unauthorized disclosure of national security information. *See Developments in the Law — The National Security Interest and Civil Liberties*, 85 Harv. L. Rev.

[1]The complicated procedural history of these cases began on August 17, 1987, with the filing of *National Federation of Federal Employees v. United States, (NFFE)*, Civil Action No. 87-2284 (D.D.C.), which attacked only one of the nondisclosure agreements — Standard Form 189 ("SF 189")— now at issue. Two weeks later, *American Federation of Government Employees, AFL-CIO v. Garfinkel, (AFGE)*, Civil Action 87-2412 (D.D.C. Sept. 1, 1987) was filed, duplicating some of the claims in 87-2284 and adding an assault on Standard Form 4193 ("SF 4193"). After these cases were consolidated, Order of Dec. 2, 1987, the Court granted leave to several members of Congress to participate as *amicus curiae*. For reasons that are evident from the following discussion, these Representatives and Senators joined with the bargaining representative of State Department employees to challenge SF 189, SF 4193, and related forms on grounds separate from those in the two existing cases. *American Foreign Service Association v. Garfinkel, (AFSA)*, Civil Action No. 88-0440 (D.D.C. filed Feb. 19, 1988). Following a status conference, all three cases were consolidated. Order of Mar. 9, 1988.

1130, 1193-94 (1972) (President has been protecting national security information since World War I) [hereinafter *National Security and Civil Liberties*]. Revamped most recently in 1982, the scheme includes the execution of nondisclosure agreements to permit civil remedies for the unauthorized disclosure of national security information. *See* Exec. Order No. 12,356, § 5.2(b), 47 Fed. Reg. 14,874 (Apr. 2, 1982) [hereinafter Exec. Order 12,356]; National Security Decision Directive 84 ¶ 1 (Mar. 11, 1983) [hereinafter NSDD 84] (Exhibit 1 to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction).

Troubled by the scope and anticipated impact of the nondisclosure agreements drafted under the Presidential scheme, plaintiffs urge the Court to enjoin implementation and enforcement of the agreements and declare them unconstitutional. Specifically attacked by the several complaints are SF 189 and SF 4193,[2] and form DD 1847-1. With important differences, each of these forms restricts the privilege of the signatory to disclose classified or "classifiable" information. Two of the forms also provide for prepublication review of manuscripts containing, purporting to contain, or derived from classified information. *See* SF 4193 ¶ 4 (Exhibit 5 to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction); DD 1847-1 ¶ 4 (June 1983).

Now pending for the Court's consideration are defendants' motion to dismiss and plaintiffs' collective motions for prelimi-

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[2]On March 18, 1988, SF 4193 was replaced by SF 4355. The impact of this substitution on the disputes in this case is contested. Defendants contend that the elimination of the term "classifiable" from SF 4355 renders the forms consistent with constitutional and statutory standards. Plaintiffs note, however, that the form continues to impose a prepublication review requirement that allegedly stifles the free speech of SF 4355 signatories.

nary injunction and summary judgment.[3] Briefly, defendants' motion vigorously questions plaintiffs' standing and the constitutionality of congressional action that purports to resolve the dispute over the nondisclosure agreements. Plaintiffs' motion for preliminary injunctive relief contends that the congressional action unequivocally prohibits implementation and enforcement of SF 189, SF 4193, and related forms, entitling plaintiffs to injunctive relief. The complexity of these issues and number of counsel arguing required severance of the underlying constitutional questions regarding specific provisions of the various agreements. Thus, argument on the motions was restricted to the issues of plaintiffs' standing, the constitutionality of the recent congressional action, and the motion for preliminary injunctive relief.

I. NATIONAL SECURITY INFORMATION, NONDISCLOSURE FORMS, AND CONGRESSIONAL INTERVENTION

Long before nuclear weapons, satellites, and orbiting laser defense systems, the President, pursuant to his Article II powers, undertook to defend national security by limiting access to and disclosure of sensitive information. *See National*

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[3]The convoluted procedural history of these cases has technically left pending two other motions. Before *AFSA* made this litigation a tripartite assault on nondisclosure agreements, defendants had moved to dismiss the *NFFE* and *AFGE* actions. Subsequent events rendered decision of those motions pointless, and they are deemed superseded by the pending omnibus motion to dismiss.

Upon joining the fray, AFSA filed a motion for preliminary injunction which they have now converted to a motion for summary judgment and permament injunctive relief. *See* Plaintiffs' Motion for Summary Judgment at 2-3. Nevertheless, plaintiffs continued to represent to the Court that preliminary injunctive relief would be welcome pending further examination of the merits. The Court, therefore, has considered the propriety of such a remedy. *See infra* § V.

Security and Civil Liberties, 85 Harv. L. Rev. at 1199. After World War II, President Truman laid the foundation for the current system of classifying information possessed by the Executive Branch. *See* Exec. Order No. 10290, 3 C.F.R. § 790 (1949-1953 Comp.). Over the past forty years, the information has diversified and the classification system has become more essential and more complex. *See Department of Navy v. Egan*, 108 S. Ct. 818, 824 (1988).

In this context, NSDD 84, supplementing Exec. Order 12,356, mandates that all people with access to certain national security information execute a nondisclosure agreement. Pursuant to these Presidential directives, the ISOO drafted SF 189 and the DCI adopted an existing document — SF 4193.[4] SF 189 was designated for use throughout the Executive Branch, while SF 4193 was intended for presentation to federal employees with access to sensitive compartmentalized information ("SCI").[5]

A. Plaintiffs' Objections to the Nondisclosure Forms

Primary among plaintiffs' objections to SF 189, SF 4193, and related forms is the use of the term "classifiable" to identify information the disclosure of which is restricted. *See* SF

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[4]SF 189 was released for use by Executive Branch agencies on September 9, 1983. The DCI's SF 4193 was prepared in 1981, before the President signed NSDD 84.

[5]Information regarding intelligence sources and methods, especially the technological mechanisms for intelligence gathering, is a particularly critical subcategory of classified information. SCI is primarily comprised of such information. *See* Declaration of William H. Webster ¶ 4 (Exhibit 4 to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction). The DCI protects this information by authority delegated to it from the President and pursuant to statutory direction. See 50 U.S.C. § 403(d)(3) (1982) ("[DCI] shall be responsible for protecting intelligence sources and methods from unauthorized disclosure").

189 ¶ 1 (Exhibit 2 to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction); SF 4193 ¶ 1 (Exhibit 5 to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction). Though undefined in the forms, the term has on several occasions been clarified by the ISOO. In its most recent incarnation, the definition restricts "classifiable information" to "[u]nmarked *classified* information, including oral communications" and "*unclassified* information that meets the standards for classification and is in the process of a classification determination." 52 Fed. Reg. 48,367 (Dec. 21, 1987) (adding 32 C.F.R. § 2003.20(h)(1)) (emphasis in original). The ISOO definition, expressly applicable only to SF 189, also narrows the scope of liability for breach of the agreement to knowing or negligent disclosure of classifiable information. *Id.*

Despite the recently particularized definition of "classifiable," plaintiffs complain that the right of SF 189 and SF 4193 signatories to speak freely and petition Congress is unconstitutionally impaired. Further, they cited section 630 of the Omnibus Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202 (Dec 21, 1987) [hereinafter Continuing Resolution], as proscribing the use of any nondisclosure form containing the term "classifiable." Section 630 provides:

> No funds appropriated in this resolution or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:
>
> (1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination;

(2) contains the term "classifiable";

(3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the rights of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;

(4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;

(5) imposes any obligations or invokes any remedies inconsistent with statutory law.

Provided, That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)-(5) of this section.

Relying on this eleventh hour addition to the Continuing Resolution, plaintiffs insist that declaratory and injunctive relief precluding use of SF 189 and SF 4193 is appropriate and that the underlying constitutionality of the forms need not to be addressed.

Equally distressing to plaintiffs is the prepublication review requirement imposed by SF 4193. Paragraph four of that form demands the signer to:

agree to submit for security review by the Department or Agency that last authorized [the signer's] access to [SCI] all information or materials, including works of fiction, which contain or purport to contain any SCI or description of activities that produce or relate to SCI or that [the signer has] reason to believe are derived from SCI, that [the signer] contemplate[s] disclosing to any person not authorized

> to have access to SCI or that [the signer has] prepared for public disclosure. . . .

Plaintiffs attack this provision as inimical to the First Amendment rights of employees. The alleged constitutional flaw is the breadth of the prepublication review imposed by this paragraph. Plaintiffs contend that the language of the proscription too broadly restricts the disclosure of information and, therefore, chills constitutionally protected speech. Like their objection to the term "classifiable," however, plaintiffs argue that the constitutional questions are deferred by section 630. *See* Continuing Resolution § 630(3).

B. Defendants' Motion to Dismiss

Defendants have responded to all the complaints with an omnibus motion to dismiss. The thrust of the motion is that plaintiffs lack standing and fail to state a claim for which relief may be granted. Given these contentions, the defendants agree with plaintiffs' argument that the constitutionality of the forms is not properly before this Court.

The broad premise of defendants' standing argument is that the plaintiffs have not alleged any injury-in-fact, an essential element of the Article III "Case or Controversy" requirement. A corollary of this contention is that plaintiffs are asserting the legal rights of third parties which is ordinarily barred by prudential principles of standing. Defendants' motion addresses each of the three categories of plaintiffs—individuals, unions, members of Congress—and concludes that none specifies a cognizable injury upon which the jurisdiction of this Court may be founded.[6]

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[6]For essentially the same reasons, defendants argue that the case is not ripe regarding plaintiffs' attempt to enjoin enforcement of the forms. The complaints are allegedly incomplete because they fail to identify an

In addition to this jurisdictional challenge, defendants contend that plaintiffs fail to state a claim upon which relief can be granted. Defendants insist that the current posture of SF 189 and SF 4193 precludes any justiciable complaint that the forms are contrary to section 630 of the Continuing Resolution or are unconstitutional. Given the existing definition of "classifiable" and the changes to SF 4193 made upon consideration of section 630,[7] defendants argue that the Executive has complied with section 630. Alternatively, defendants contest the power of Congress to interfere with the President's execution of his responsibility to protect the national security.

II. PLAINTIFFS' STANDING TO CHALLENGE EXECUTIVE BRANCH POLICY REGARDING ENFORCEMENT AND IMPLEMENTATION OF NONDISCLOSURE AGREEMENTS

In this two-pronged challenge to the Executive's use of nondisclosure agreements, the question of standing must be bifurcated accordingly. The first substantive challenge for the Court's consideration is section 630, the power of Congress to enact such legislation, and the Executive's compliance with the section. As to this issue, the plaintiffs urge that the Ex-

instance of enforcement, planned enforcement, or revocation of security clearance. Moreover, the implementation issue is allegedly moot as to SF 189 because the ISOO has suspended the use of that form. *See* Letter from Steven Garfinkel, Director, ISOO (Dec. 29, 1987) (Exhibit 8 to Plaintiffs' Motion for Preliminary Injunction).

[7]In response to the concerns reflected in section 630, the DCI, through Lieutenant General Edward J. Heinz, Director of the Intelligence Community Staff, supplemented SF 4193 with an addendum to all such forms executed during fiscal year 1988. The addendum provides:

> The obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with [section 630], and other applicable law.

ecutive has failed to abide by the spending restrictions of section 630. This issue only indirectly implicates constitutional rights personal to the plaintiffs or their members. Instead, the directly conflicting forces are two branches of government. The second attack on the agreements is founded on a perceived conflict between plaintiffs' First Amendment rights and the Executive's interest in safeguarding classified information. Inherently, this attack directly implicates the rights of individuals and, therefore, invites a different standing analysis.

Notwithstanding the melting pot pleading that has resulted from consolidation of these cases, certain plaintiffs realistically assert only one or the other of the challenges to the Executive's action. Consequently, the plaintiffs' standing as to each of these prongs must be discussed separately. The standing of each of the three categories of plaintiffs is a subissue in each discussion.

A. Article III and Prudential Limits on Standing

As a consequence of the constitutional requirement that federal courts adjudicate only cases and controversies, U.S. Const., Art. III, plaintiffs have always been required to demonstrate their standing to challenge the actions contested by their lawsuits. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). Also protected by the "standing" requirement are prudential concerns regarding accessibility to federal forums and the intimacy between a plaintiff's purported interest, the parties' dispute, and the redress sought. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975).

To surmount the constitutional hurdle, a plaintiff must:

> at an irreducible minimum . . . "show that he personally has suffered some actual or threatened in-

> jury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

Valley Forge, 454 U.S. at 472 (footnote omitted). The battle joined by the parties must be more than abstract debate waiting to alight on a concrete foundation of facts. The plaintiff must show injury-in-fact, *id.* at 473, but he need not delay his quest for redress until the injury is complete. "'If the injury is certainly impending that is enough.'" *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). This concern is particularly acute when, as in this case, the relationship between Congress and the President is implicated. *Valley Forge*, 454 U.S. at 473-74.

Beyond these limits on judicial power, prudential principles demand that a plaintiff act to vindicate his own rights, not those of a third party. *Warth*, 422 U.S. at 499. The impact of these principles on Article III constraints further requires that the controversy be palpable to a distinct and confined population group. The courts will not be embroiled in ventilation of grievances widely shared—grievances better resolved by Congress. *Valley Forge*, 454 U.S. at 474-75.

B. Standing to Challenge the Executive's Implementation of Section 630

Both the constraints of Article III and the ancillary prudential concerns present formidable obstacles to plaintiffs' attempt to enforce the spending restrictions of section 630. The in-

dividual plaintiffs and labor unions apparently fear that disregard for section 630 — continued compelled execution of non-disclosure agreements — will stifle disclosure of unclassified governmental information.[8] The right to be vouchsafed by enforcement of section 630 is that possessed by every federal employee to speak freely when compelling governmental interests do not justify circumscription of that freedom.

The injury feared by the congressional plaintiffs is one step further removed. As members of Congress, these plaintiffs assert a right to receive all governmental information under the security of congressional rules for protection of confidential information. If the right of federal employees to disclose information is restricted, the right of Congress to receive it is proportionately limited.

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[8]A less specific premise upon which plaintiffs might assert standing is their interest, as citizens, to ensure that Congress' enactments are faithfully executed by the President. As defendants note, such a premise is essentially that once relied upon by taxpayers to challenge spending decisions of the Executive Branch. *See Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *Public Citizen, Inc. v. Simon*, 539 F.2d 211, 217 (D.C. Cir. 1976). As in *Public Citizen*,

> the fair implication of [this premise] is to recognize taxpayer standing to attack any executive action that draws on an outstanding appropriation on the ground that the purchases or services are not in accord with the congressional intent in passing the appropriation. This would place the judiciary in the role of management overseer of the Executive Branch. Such oversight is a function of Congress.

539 F.2d at 217. Under the narrow doctrine of *Flast v. Cohen*, 392 U.S. 83 (1968), taxpayer suits are limited to cases alleging specific constitutional proscriptions on taxing and appropriation statutes. *Public Citizen*, 539 F.2d at 218.

1. Congressional Plaintiffs Have No Standing to Challenge the Executive's Implementation of Section 630

To the extent that the congressional plaintiffs assert the rights of federal employees, their standing is suspect. Without question, members of Congress enjoy no privilege in federal court to defend the rights of third parties.[9] *See Warth*, 422 U.S. at 499 (plaintiff must seek vindication of own rights, not those of third parties); *Harrington v. Bush*, 553 F.2d 190, 204 (D.C. Cir. 1977) (no special standards for congressional standing). Under narrowly prescribed circumstances, however, congressional plaintiffs are welcome in federal court to reverse a diminution in influence resulting from Executive action. *See Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979).

> To be cognizable for standing purposes, the alleged diminution in congressional influence must amount to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity; and the plaintiff must point to an objective standard in the Constitution, statutes or congressional house rules, by which disenfranchisement can be shown.

Id. (citing *Harrington*, 553 F.2d at 212). In contrast, "a diminution in a legislator's effectiveness, subjectively judged by him or her, resulting from Executive action withholding information or failing to obey a statute enacted through the legislator's vote, where the plaintiff-legislator still has power to act through the legislative process to remedy the alleged

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[9]This principle fatally infects any attempt by the Congressional plaintiffs to challenge the nondisclosure forms as contrary to the Constitution. None of these plaintiffs has been required to sign such a form. Thus, they have suffered no injury-in-fact upon which standing could be based.

abuses," *id.*, does not amount to an injury-in-fact sufficient to confer standing.

In this case, the congressional plaintiffs allege only that the Executive agencies have not complied with section 630 and, thereby, have stemmed the flow of information to Congress. Under *Goldwater*, such a claim is clearly inadequate to confer standing. Because the congressional plaintiffs may not employ judicial processes to enforce their view of section 630 or to challenge, on behalf of federal employees, the provisions of SF 189, SF 4193, and related forms, all claims asserted by them are dismissed.

2. The Labor Union Plaintiffs Have Standing Under the Administrative Procedure Act to Challenge Interpretation and Implementation of Section 630

The labor union plaintiffs attack the implementation of section 630 by the ISOO, DCI, and DOD on the ground that the action taken by these agencies is arbitrary, capricious, and otherwise not in accordance with the law. 5 U.S.C. § 706 (1982). The unions' allegations focus on harm to their members and not on any impairment of the unions' capacity to function as bargaining representatives. Thus, their standing is contingent upon the standing that individual members would have to press the claims now asserted by the unions. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977); *see Warth*, 422 U.S. at 511. Additionally, the unions must demonstrate that "the interests [they] seek[] to protect are germane to the organization[s'] purpose; and . . . neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343.

The standing of individual union members turns on the constitutional and prudential considerations already discussed as well as statutory requirements under the Administrative Procedure Act ("APA").[10] 5 U.S.C. § 702 (1982). Section 702 of the APA permits "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, . . . to judicial relief thereof." This statutory gloss on standing principles adds to the showing of injury-in-fact a requirement that plaintiffs be "arguably within the zone of interests to be protected or regulated" by section 630 of the Continuing Resolution. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970); *see Abourezk v. Reagan*, 785 F.2d 1043, 1050 (D.C. Cir. 1986).

The agency actions of which the unions complain are the policies of the DCI, DOD, and ISOO regarding implementation and enforcement of SF 189, SF 4193, and DD 1847-1 during fiscal year 1988. Following enactment of section 630, the ISOO instructed all federal agencies to suspend implementation of SF 189 and to void at the behest of the signatory any SF 189 executed after December 22, 1987. The DCI, however, merely added a paragraph to its SF 4193 which states that the agreement will be enforced in a manner consistent with the requirements of section 630. Federal employees with access to SCI are still required to sign this amended version of the form.[11]

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[10]This analysis applies equally well to determine whether individual members of the plaintiff unions would have standing in their own right.

[11]On March 22, 1988, SF 4193 was discontinued and replaced by SF 4355 which omits the term "classifiable information" but continues the requirement of prepublication review.

Plaintiffs urge that section 630 requires that all SF 189 forms executed after December 22, 1987 be voided and that all signatories of forms in this group be informed of this action. They also insist that the ISOO be compelled to direct all administrative agencies that execution of SF 189 is not a prerequisite to access to classified information, at least during fiscal year 1988. Regarding SF 4193 and its progeny, the plaintiffs make similar demands for relief, insisting that the addendum to SF 4193 and the successor SF 4355 do not avoid the proscriptions of section 630.

The complaints, which range from twenty-two paragraphs with four counts to eighty-six paragraphs with thirteen counts, successfully, though barely, establish a factual premise for the standing of the plaintiff unions. A generous, but fair reading of each of the complaints reveals allegations that members of the plaintiff unions have been required to sign SF 189 or SF 4193 since December 22, 1987. *See Pennell v. City of San Jose*, 56 U.S.L.W. 4168, 4169 (Feb. 23, 1988) (district court considering motion to dismiss based on pleadings must construe complaint in light most favorable to plaintiffs). While mere execution of the forms is not injury-in-fact, compulsory execution coupled with the express and implied restrictions on speech constitutes such injury-in-fact.

Contrary to defendants' argument, the allegation of chilling effect is not *per se* an insufficient basis for standing. More precisely, the question is whether the chill felt by plaintiffs is wholly subjective in which case they have failed to establish an injury-in-fact that the Court is empowered to redress. *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("[a]llegations of subjective 'chill' are not an adequate substitute for a claim of specific present objective or harm or a threat of specific future harm"); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378-79 (D.C. Cir. 1984) (rejecting standing of group fearing surveillance of its activities under particular

Executive Order and anticipating consequent chill of free speech). Objectivity is lent to the anticipated infringement of First Amendment rights when:

> the challenged exercise of governmental power [is] regulatory, proscriptive, or compulsory in nature, and the complainant [is] either presently or prospectively subject to the regulations, proscriptions, or compulsions that he [is] challenging.

Laird, 408 U.S. at 11. The source of the plaintiffs' fear must be more than their "knowledge that a governmental agency [is] engaged in certain activities or . . . that, armed with the fruits of those activities, the agency might in the future take some *other* and additional action detrimental to that individual." *Id.* (emphasis in original). Thus, objective, indirect impairment of First Amendment rights may be injury-in-fact.

Although the complaints do not explicitly state that any member of the plaintiff unions has been compelled to sign the nondisclosure forms under threat of discharge or denial of security clearance, the position of the unions as exclusive bargaining agents and the language of the forms make clear that these consequences would flow from refusal to execute or comply with the forms. *See* Affidavit of Perry Shankle ¶ 5 (President of AFSA states that members have told him that they are still being required to execute SF 4193 but seek anonymity for fear of reprisal). Thus, the chilling effect on First Amendment rights of continued compulsory implementation and threatened enforcement of the forms is sufficient injury-in-fact to confer standing.[12] With this conclusion, the injury-

[12]As noted previously, execution and threatened enforcement of SF 4193 continued, until March 22, 1988, with an addendum purporting to render the form consistent with section 630 of the Continuing Resolution. While execution of SF 189 has been suspended, the ISOO has expressed no intention to waive enforcement of the form during fiscal year 1988. Consequently, it must be assumed that enforcement is still threatened.

in-fact prong of APA standing is satisfied. The requirements of section 702 of the APA are completed because it is obvious that federal employees subject to the Executive's national security information policies comprise the group to be protected by section 630 of the Continuing Resolution.

3. The Standing of the Individual Plaintiffs

Of the three individual plaintiffs,[13] none purports to have been required to sign SF 189 since enactment of section 630 of the Continuing Resolution on December 22, 1987. Plaintiff Douglas, however, signed SF 189 before that date and now complains that the ISOO has failed to take appropriate steps to apprise him, and others like him, that the SF 189 cannot be enforced during fiscal year 1988. He contends that the apparent intention of the ISOO to enforce the agreement in contravention of section 630 dissuades him from exercising his constitutional and statutory right to speak freely. *See* Affidavit of Steven Garfinkel ¶¶ 2-4 (Exhibit 7 to Plaintiffs' Motion for Preliminary Injunction). As discussed extensively in the preceding section, an objective chill on First Amendment rights as a consequence of an exercise of governmental power, compulsory in nature, sufficiently states injury-in-fact to confer standing. Thus, plaintiff Douglas has standing to challenge the

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[13]Jim Stinchcomb, James Douglas, and Louis Brase are plaintiffs in *AFGE*, No. 87-2412-OG. Stinchcomb alleges that he has been instructed to sign SF 189 but has refused. As a consequence he has allegedly been "threatened with security clearance revocation and resultant loss of employment." Complaint ¶ 4. Douglas has signed SF 189 but alleges that he did so only after he was threatened with revocation of his security clearance and discharge from his position with the Department of Navy. Brase has signed SF 4193 under the same conditions, but has refused to sign SF 189. Douglas and Brase executed their agreements before December 22, 1987.

ISOO's failure to inform signatories to SF 189 that enforcement will not be undertaken during fiscal year 1988.

The same conclusion must be reached regarding plaintiff Brase's execution before December 22, 1987 of SF 4193. The DCI has expressed its intention to continue enforcing previously executed forms. *See* Affidavit of Lieutenant General Edward J. Heinz ¶ 4 (Exhibit 6 to Plaintiffs' Motion for Preliminary Injunction) (only change to SF 4193 in light of section 630 is addendum). Consequently, Brase performs his functions as a Training Manager with the Air Force under the cloud of threatened discharge or loss of security clearance for violation of the agreement.

Plaintiff Stinchcomb, having refused to sign an SF 189, can suffer no injury under the ISOO's present scheme. Since the form will not be implemented during fiscal year 1988, Stinchcomb cannot be threatened with discharge for refusing to execute the form. Obviously, he cannot be the object of enforcement action because he has not executed an SF 189. Stinchcomb lacks standing to challenge the existing Executive policy regarding nondisclosure agreements.

4. Summary of Standing to Challenge the Executive's Implementation and Enforcement of Nondisclosure Agreements as Contrary to Section 630

For all purposes, the congressional plaintiffs may be dismissed from the *AFSA* case because they allege no injury-in-fact upon which standing may be based. Limitations on their access to information and diminution of their effectiveness as members of Congress does not constitute injury redressable in the federal courts. Additionally, they have no standing to protect the rights of third parties.

In contrast, the labor union plaintiffs have alleged, with less than meticulous precision, a collection of facts which in the aggregate constitutes injury-in-fact to some of their individual members. Those union members who signed nondisclosure agreements after December 22, 1987, have been compelled by governmental power to take action that allegedly chills their legitimate exercise of constitutional and statutory free speech rights.

Of the three individual plaintiffs, two have standing to challenge the Executive's interpretation of section 630. Plaintiff Douglas has executed a SF 189, and the ISOO apparently intends to take enforcement action against any violation of the agreement. The same is true regarding plaintiff Brase's execution of the DCI's SF 4193.

III. PLAINTIFFS' STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE NONDISCLOSURE AGREEMENTS

As originally filed, the complaints in *NFFE* and *AFGE* sought a declaration that SF 189, SF 4193, and related forms are unconstitutional as overbroad and impermissibly restrictive of First Amendment rights.[14] In their motion to dismiss, the defendants contest the standing of the individual and labor union plaintiffs to challenge the constitutionality of the nondisclosure forms. Defendants argue, as they did regarding the section 630 claims, that neither the individuals nor the labor unions have alleged an injury-in-fact upon which standing may be founded. In defendants' view, only threatened or actual

[14]Plaintiffs in *AFSA* challenge only the Executive's interpretation of section 630 and implementation of nondisclosure agreements under this provision of the Continuing Resolution.

discharge is sufficient to satisfy the constitutional requirement of injury-in-fact.

This stringent view of standing is without foundation. As noted in sections II.A and II.B.2 of this opinion, injury need not be consummated to establish standing. *See Babbitt*, 442 U.S. at 298 ("certainly impending" injury is enough). Moreover, the chilling effect of governmental action on exercise of First Amendment rights may be sufficient injury-in-fact if the exertion of governmental power is regulatory, proscriptive, or compulsory in nature. *See Laird*, 408 U.S. at 11. The vitality of "chill" as a premise for standing turns on the existence of objective causes for the plaintiffs' reluctance to exercise First Amendment Rights. An entirely subjective chill is not injury-in-fact. The action must have already been taken or threatened. *Id.* at 13-14. The "chill" alleged by plaintiffs arises entirely from compelled execution of the nondisclosure agreements which expressly and impliedly threaten discharge or loss of security clearance. Execution of an agreement subjects the signatory to civil and employment penalties for unauthorized disclosure of classified or "classifiable" information. Despite the clarification of the term "classifiable," plaintiffs reasonably contend that the vagueness of the term precludes precise delineation of information that may not be disseminated. Thus, the legitimate exercise of First Amendment rights is potentially impaired. This "chill" constitutes injury-in-fact.[15]

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[15]The standing analysis is inextricably related to the merits of plaintiffs' constitutional claims. By merely alleging an injury-in-fact, plaintiffs do not necessarily succeed on the merits of their claim. The overbreadth doctrine of the First Amendment requires a careful examination of the government's interest in restricting speech. Thus, plaintiffs' injury may be sufficient to reserve a seat for them in the courtroom, but the Court may decline to remedy the injury.

The labor union plaintiffs have standing to represent their members in this case because those members who have signed the forms have standing in their own right to seek redress. As already noted, protection of the members' interest is squarely within the avowed purposes of the unions. Additionally, there is no reason to require that individual members participate in the suit. *See Hunt*, 432 U.S. at 343.

All of the individual plaintiffs have standing because they have signed or been directed to sign SF 189 or SF 4193. The government's attempt, successful or not, to compel execution of the forms has plausibly had a chilling effect on the exercise of First Amendment rights. Plaintiffs have sufficiently alleged that execution of the forms is compelled by threats of discharge or loss of security clearance. Moreover, plaintiffs Douglas and Brase, who have executed SF 189 and SF 4193, respectively, suffer the additional effects of the threat of enforcement of the forms.

IV. THE AUTHORITY OF CONGRESS TO RESTRICT PRESIDENTIAL REGULATION OF ACCESS TO AND DISCLOSURE OF NATIONAL SECURITY INFORMATION

Assuming that the Executive's actions since enactment of section 630 do not comply with the requirements of that legislation, the defendants argue that section 630 unconstitutionally impinges on the President's discretion to regulate access to and disclosure of national security information.[16] Traditionally,

[16]Without the benefit of extended discussion, the Court notes that this assumption is well-founded. Section 630 expressly bars the use of fiscal year 1988 funds to "implement or enforce the agreements in Standard Forms 189 and 4193." Nevertheless, the DCI continued to require execution of the form until March 22, 1988 when SF 4355 was adopted. The addendum to SF 4193, which purports to cleanse the agreement of provisions offensive to section 630, plainly is not "true to the congressional

Executive Orders have been the mechanism for establishing systems for ensuring the secrecy of sensitive information. *See, e.g.*, Exec. Order No. 10290, 3 C.F.R. § 790 (1949-1953 Comp.); Exec. Order 12,356. The constitutional premise for the President's oversight of national security information is his role as Commander in Chief, U.S. Const., Art. II, § 2, and head of the Executive Branch. *See Department of Navy*, 108 S. Ct. at 824. This role for the President is sensible, in defendants' view, because national security information is generated primarily by the Executive Branch to assist the President in conducting foreign relations. *See United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936). Never has the President's activity in this area been dependent upon express legislative authorization. *See Department of Navy*, 108 S. Ct. at 824 (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 890 (1961)); *National Security and Civil Liberties*, 85 Harv. L. Rev. at 1198.

The defendants' position does not preclude congressional activity relating to national security information, and they admit that categorical division of responsibility between the Legislative and Executive Branches is not possible. *See United States v. American Telephone & Telegraph Co.*, 551 F.2d 384, 392-93 (D.C. Cir. 1976). Tradition and prudence, they contend, in construing constitutional apportionment of authority demand that Congress be excluded from restricting the means by which the Executive protects national security information.

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mandate from which it derives authority," *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1499-1500 (D.C. Cir. 1984), and is based on an "erroneous view of the law" as Congress has written it. *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943)). Thus, if section 630 embodies constitutionally permissible congressional action, judicial review under the APA, 5 U.S.C. § 706, of the DCI's action would likely determine the action to be contrary to law.

Concurring in *New York Times Co. v. United States*, 403 U.S. 713 (1971), Justice Stewart discussed the critical importance of secrecy to the effective discharge of the President's almost plenary power over national defense and international relations. He noted:

> If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. . . . [I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.
>
> This is not to say that Congress and the courts have no role to play. Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets.

Id. at 729-30. Accepting this broad portrayal of Executive power, defendants conclude that section 630 unconstitutionally impairs the President's power to fulfill his plenary responsibilities to ensure a sound national defense and represent the interests of the United States in other nations.[17]

[17]Equally troubling to the defendants is Congress' alleged attempt by section 630 to impose substantive limitations with a budgetary enactment. Section 630 is merely an appropriations measure by which no substantive

Plaintiffs' response is simply that defendants take an overly broad view of the complaints and the effect of section 630. "[T]his case concerns discrete limits that Congress has placed on the extent to which such nondisclosure agreements can limit congressional disclosures and can go beyond information that is classified pursuant to executive order or in the process of being so classified." Plaintiffs' Opposition to Defendants' Motion to Dismiss at 11.

If by "discrete" plaintiffs mean identifiable or enumerated, their characterization of this case and section 630 may be correct, but the fact that provisions of section 630 are clearly stated does not immunize it from constitutional challenge. Given the constitutional and traditional role of the Executive in assuring the nation's security and gathering and protecting the information essential to that security, section 630 demands some pronouncement of the permissible scope of congressional intrusion upon these functions. Ordinarily difficult, the task of drawing a line across which the political branches may not tread is more troublesome in this context because judicial consideration of this problem has been rare. *See United States v. American Telephone & Telegraph Co.*, 551 F.2d 384, 390 (D.C. Cir. 1976), *on rehearing* 567 F.2d 121, 126-27 (D.C. Cir. 1977).

Neither political branch is expressly charged by the Constitution with regulating accumulation of or across to national security information. *American Telephone & Telegraph Co.*, 567 F.2d at 128 (citing L. Henkin, Foreign Affairs and the Con-

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rights or causes of action are created. By such a measure, Congress cannot accomplish that which by direct legislative action would be beyond its constitutional authority. *Cf. United States v. Lovett*, 328 U.S. 303, 316 (1946) (budgetary action designed to punish certain individuals is Bill of Attainder just as if Congress had passed law declaring individuals guilty of crime).

stitution 16-17 (1972)). "The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." *Department of Navy*, 108 S.Ct at 824. Historically, the role of Congress in this arena has been to facilitate secrecy with appropriate criminal and civil sanctions. *See New York Times*, 403 U.S. at 730. Section 630 departs from history and threatens the balance struck by time and constitutional implication between the pervasive importance of strict protection of national security information and Congress' institutional need for that information.

The sensitive and complicated role cast for the President as this nation's emissary in foreign relations requires that congressional intrusion upon the President's oversight of national security information be more severely limited than might be required in matters of purely domestic concern. *See Curtiss-Wright*, 299 U.S. at 320. Section 630 cannot be construed as consistent with this principle or with the President's recognized authority. The statute does much more than protect Congress' access to classified information—a goal readily achieved by subpoena or perhaps cooperation. *See American Telephone & Telegraph*, 567 F.2d at 130-32. With a tug on the purse strings, Section 630 establishes a precedent unrestrained by discernible standards and intrudes dramatically upon Presidential authority.

Particularly offensive to the need for judicially manageable standards are subsections (3) through (5) of section 630. The first of these prohibits obstruction by the Executive of the right of any federal employee to communicate with Congress under the rules of Congress for maintaining security. Subsection (4) bars interference with "the right of the Congress to obtain executive branch information" under similar rules for maintaining security. The last of these subsections bars any nondisclosure agreement that imposes an obligation or provides

a remedy inconsistent with existing statutes. Read together, these provisions of section 630 permit the President to ensure the secrecy of national security information only by those means authorized by Congress.

Wherever may be drawn the line between the political branches in the area of regulating access to national security information, section 630 surely falls within territory where it is not welcome. The statute impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations. Section 630 is, therefore, unconstitutional.

V. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND DISPOSITION OF THE *AFSA* CASE

Originally filed by plaintiffs in *AFSA*, the motion for preliminary injunction seeks equitable enforcement of the proscriptions of section 630. Because the Court finds that legislation to intrude beyond constitutional limitations into the realm of the Executive, relief of any kind based on section 630 is necessarily unavailable. The consequence is not merely that a preliminary injunction will not be entered.

The *AFSA* case is founded entirely on section 630 which, in light of the Court's ruling, provides no basis for relief. Without section 630 as a legal foundation for their claims, the plaintiffs in that case state no claim upon which relief can be granted. *See District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1081 (D.C. Cir. 1984); *Sacks v. Reynolds Securities, Inc.*, 593 F.2d 1234, 1239 (D.C. Cir. 1978). Moreover, because the Court was presented with and considered material extrinsic to the pleadings and the parties had adequate opportunity to submit such material, defendants' motion to dismiss will be treated as a motion under Rule 56 for summary judgment. *See*

Sacks, 593 F.2d at 1239; Fed. R. Civ. P. 12(b). Accordingly, summary judgment will be entered for defendants in *American Foreign Service Association v. Garfinkel*, Civil Action No. 88-0440-OG (D.D.C. filed Fed. 19, 1988). For the same reason, Count III of the complaint in *National Federation of Federal Employees v. United States*, Civil Action No. 87-2284-OG (D.D.C. filed Aug. 17, 1987) and Count XIII of the complaint in *American Federation of Government Employees v. Garfinkel*, Civil Action No. 87-2412-OG (D.D.C. filed Sep. 1, 1987) are dismissed.

VI. OTHER CLAIMS RAISED BY PLAINTIFFS IN *NFFE* AND *AFGE*

Apart from First Amendment overbreadth and vagueness claims, plaintiffs in *NFFE* and *AFGE* offer a variety of constitutional and statutory theories upon which SF 189, SF 4193, and similar nondisclosure forms might be declared unlawful. Defendants characterize some of the claims based on these theories as frivolous and move to dismiss them as without basis in the law. Additionally, defendants' motion provides occasion for the Court to consider the legal sufficiency of all the remaining claims. *See Hudgins v. I.R.S.*, 620 F. Supp. 19, 20 (D.D.C. 1985) (dismissing under Rule 12(b)(6) *sua sponte*); *Martin-Trigona v. Acton Corp.*, 600 F. Supp. 1193, 1201 (D.D.C. 1984) (same).

A. Distinctions Between SF 189 and SF 189-A Do Not Deprive Federal Employees of Equal Protection Under the Law

SF 189-A, a variant of the ISOO's SF 189, is a nondisclosure agreement presented for execution to government contractors who may require access to classified information. The variation of allegedly constitutional dimension is the omission

from SF 189-A of the term "classifiable." Because the distinction is not inherently invidious, does not impinge on any fundamental right, and does not create a suspect classification, the Court's scrutiny of the variation must be minimal. *See Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 29 (1973). At this level of judicial review, the government's action need only be rationally related to a legitimate objective. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

Typically, the courts are summoned to examine the rationality of a governmental classification when the legislature addresses social or economic problems. *See Schweiker*, 450 U.S. at 230; *Dandridge*, 397 U.S. at 485. Judicial deference to legislative judgments in these areas recognizes that the legislatures are "the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems." *Schweiker*, 450 U.S. at 230. Restraint is equally appropriate because the courts "lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues." *Rodriguez*, 411 U.S. at 41. The breadth of leeway afforded legislatures in these areas is so substantial that "if any state of facts reasonably can be conceived that would sustain [social or economic legislative action], the existence of that state of facts at the time that the law was enacted must be assumed." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911) (*quoted in Dandridge*, 397 U.S. at 485).

Just as Congress' institutional competence to make economic and social policy justifies minimal scrutiny, the acknowledged expertise of the President in protecting national security information demands commensurate restraint by this Court. The use of "classifiable" in SF 189, but not SF 189-A, is legitimate-

ly explained by the primary access of federal employees to information generated by the Executive branch from a variety of intelligence sources. Contractors ordinarily will have access to such information only after it has been filtered through government employees with the expertise and authority to classify documents. The protection of such documents is a legitimate goal reasonably achieved by the expanded scope of SF 189, and the Court is without competence to say that the Executive's judgment is "patently arbitrary or irrational." *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 177 (1980). Accordingly, the cited distinction between SF 189 and SF 189-A states no claim under Equal Protection principles embodied in the Fifth Amendment, and Count III of the *AFGE* complaint is dismissed.

B. There is No Private Right of Action Under the Whistle-Blower Protection Statute

Section 101(a) of the Civil Service Reform Act ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1114 (1978), bars personnel action against any federal employee in retaliation for disclosure of information evidencing "a violation of any law, rule, or regulation, or . . . mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public safety." 5 U.S.C. § 2302(b)(8)(A) (1982). This protection against reprisal evaporates, however, if the disclosure is "specifically prohibited by law [or] if [the] information is . . . specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." *Id.*

To enforce the protection against retaliatory personnel action, the CSRA establishes an elaborate scheme which requires investigation by the Office of Special Counsel of the Merit Systems Protection Board of any allegedly prohibited personnel

action. *Id.* § 1206(c)(1)(A). The CSRA is entirely silent regarding judicial enforcement of the prohibitions against reprisal. Considering these entirely consistent characteristics of the CSRA, the court in *Borrell v. United States International Communications Agency*, 682 F.2d 981, 987 (D.C. Cir. 1982) determined that section 101(a) creates no private right of action to enforce in the district courts the prohibitions against retaliation for whistle-blowing. The Court of Appeals affirmed a district court ruling that subject matter jurisdiction is lacking over any action founded on section 101(a). *Id.* at 988.

The *Borrell* decision is fatal to claims in *NFFE* and *AFGE* that SF 189 and SF 4193 are unlawful because they create a mechanism for retaliation against whistle-blowers in contravention of the CSRA. This Court lacks jurisdiction over any such claim. Accordingly, Count I of the *NFFE* complaint and Count IV of the *AFGE* complaint are dismissed.

C. The Code of Ethics for Government Service Affords No Legal Basis for Challenge of Non-disclosure Agreements

In 1980, Congress adopted a ten-point Code of Ethics to be posted in all federal buildings. Pub. L. No. 96-303, § 3, 94 Stat. 855 (uncodified). The ninth of these guidelines for conduct of federal employees states that "[a]ny person in Government service *should* . . . [e]xpose corruption wherever discovered." (Emphasis added). By its terms, this Code of Ethics is entirely advisory and imposes no affirmative legal obligation on any government employee to investigate or disclose corruption in government.

Count IV in the *AFGE* complaint asserts that SF 189 and SF 4193 are unlawful because they are contrary to the Code. Such an argument is patently frivolous and unnecessarily

duplicative of other legal theories in the complaint. Catch-all pleading of this kind only serves to distract the Court's attention from worthwhile claims. Accordingly, Count IV is dismissed.

D. Count VIII Omits an Essential Element of a Claim Under Section 706(2) of the APA

When asked to examine agency action, the reviewing court may hold unlawful such action if it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). Demanding such a determination by this Court regarding SF 4193, plaintiffs argue that the DCI promulgated the form on the basis of paragraph 1(b) of NSDD 84. That paragraph was allegedly withdrawn by the President in 1984.

Assuming that plaintiffs correctly describe the status of paragraph 1(b) of NSDD 84, they entirely omit an essential element of review under section 706(2)(C) of the APA. NSDD 84 is a presidential document establishing guidelines for protection of national security information. Certainly, plaintiffs must admit that NSDD 84 is not a statute; yet this Court is empowered by section 706(2)(C) only to verify that SF 4193 is within the scope of the DCI's statutory authority. Because plaintiffs cite no statute by which the SF 4193 should be measured, they fail to state a claim, and Count VIII of the complaint in *AFGE* is dismissed.

E. The Copyright Clause Does Not Preclude the Executive from Requiring Federal Employees to Assign to the Government the Proceeds of Any Unlawful Disclosure of Government Information

No less frivolous is the claim made by plaintiffs in *AFGE* that the Copyright Clause, U.S. Const., art. I, § 8, cl. 8, preempts any attempt by the President to require his employees to assign to the government the proceeds of any unlawful disclosure of government information. While making sense of this claim is a formidable challenge, plaintiffs appear to argue that SF 189 and SF 4193 create a property right that may only be created by Congress. These forms, however, cannot be construed by even the most liberal interpretation to create an exclusive right for anyone in writing. They do not give the government an exclusive right to any information; at most, they impose a sanction by agreement for the unauthorized disclosure of government information.

The legality of such an assignment of proceeds is unequivocally established by *Snepp v. United States*, 444 U.S. 507, 515 (1980) (per curiam). As a condition of his employment with the CIA, Snepp had signed an agreement assigning to the government any proceeds of disclosure of any information relating to the agency which disclosure was not submitted for prepublication review. Addressing Snepp's claim that the agreement was an unconstitutional prior restraint on protected speech, the Supreme Court declared that "the agreement [was] an 'entirely appropriate' exercise of the CIA Director's statutory mandate to 'protec[t] intelligence sources and methods from unauthorized disclosure.'" *Id.* at 509 n.3 (quoting *United States v. Snepp*, 595 F.2d 926, 932 (4th Cir. 1979) and 50 U.S.C. § 403(d)(3)). Plaintiffs in *AFGE* have entirely ignored the force of this authority which directly contradicts Count IX of their complaint. Accordingly, that Count is dismissed.

F. Plaintiffs in *AFGE* State No Claim Under the Freedom of Information Act

The Freedom of Information Act ("FOIA"), Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified at 5 U.S.C. § 552), requires that government agencies "make available to the public" a variety of information generated by them. The purpose of the FOIA is to permit access to governmental information the secrecy of which is unnecessary. *See EPA v. Mink*, 410 U.S. 73, 80 (1973). Exceptions to the broad mandate for disclosure permit the agencies to withhold as confidential certain narrowly defined categories of information, including "matters that are . . . specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1).

Plaintiffs in *AFGE* reason that the Executive may not require its employees to withhold information in contravention of FOIA. While this may be true, plaintiffs are in no position to make such an argument before this Court. Neither the union nor the individual plaintiffs assert that they have sought information from the Executive under FOIA. Instead, they are complaining that SF 189 and SF 4193 preclude disclosure by them. Such a claim is not within the ambit of FOIA which authorizes this Court only to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U.S.C. § 552(a)(4)(B). Accordingly, plaintiffs fail to state a claim under FOIA, and Count X of the complaint in *AFGE* is dismissed.

G. Counts XI and XII of the *AFGE* Complaint Are Unintelligible

After several careful readings of Counts XI and XII of the *AFGE* complaint, the Court is unable to discern a singular legal theory upon which the plaintiffs might demand relief. Count XI appears to allege some contractual basis for declaring SF 189 and SF 4193 unlawful. The mere appearance of a claim, however, is insufficient to permit plaintiffs to move forward; they could prove no facts that would permit recovery on the unintelligible legal theory in Count XI.

Count XII suffers from similar faults and more. Rather than stating a discrete legal basis for declaring the nondisclosure forms unenforceable, plaintiffs restate, in summary, theories exposited elsewhere in their complaint. Perhaps, they realize that such a summary is necessary to conclude an eighty-seven paragraph complaint. Regardless, the Court is unable to discern a distinct basis for relief in Count XII. *See* Fed. R. Civ. P. 8(a). Therefore, it is dismissed.

VII. CONCLUSION

The accompanying order sets forth in detail the effect of this opinion on the complaints in these consolidated cases. In summary, various plaintiffs have standing to challenge the Executive's interpretation and execution of section 630 of the Continuing Resolution and the constitutionality of various provisions of SF 189, SF 4193, and related forms. Nevertheless, the Court finds section 630 unconstitutional and, therefore, dismisses the *AFSA* case. For the same reason, counts in the *NFFE* and *AFGE* cases are dismissed. In addition, numerous counts in the *AFGE* complaint are dismissed for failure to state a claim. There remains essentially the plain-

tiffs' challenge of the nondisclosure agreement on the First and Fifth Amendment grounds.

/s/
United States District Judge
Oliver Gasch

Date: May 27, 1988

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, Plaintiff, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	)	Civil Action No. 87-2284-OG
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*, Plaintiffs, v. STEVEN GARFINKEL, *et al.*, Defendants.	)	Civil Action No. 87-2412-OG
AMERICAN FOREIGN SERVICE ASSOCIATION, *et al.*, Plaintiffs, v. STEVEN GARFINKEL, *et al.*, Defendants.	)	Civil Action No. 88-0440-OG

ORDER

Upon consideration of plaintiffs' Motion for Preliminary Injunction, plaintiffs' Motion for Summary Judgment, defendants' Motion to Dismiss, the oppositions thereto, the arguments of counsel, and the record herein and for the reasons stated in the accompanying memorandum, it is by the Court this 27th of May, 1988

ORDERED that plaintiffs' Motion for Preliminary Injunction be, and hereby is, denied; and it is further

ORDERED that plaintiffs' Motion for Summary Judgment be, and hereby is, denied; and it is further

ORDERED that defendants' Motion be, and hereby is, granted, in part, and denied, in part; and it is further

ORDERED that summary judgment be, and hereby is, granted for defendants in *American Foreign Service Association v. Garfinkel*, Civil Action No. 88-0440-0G; and it is further

ORDERED that Counts I and III of the complaint in *National Federation of Federal Employees v. United States*, Civil Action No. 87-2284-OG be, and hereby are, dismissed; and it is further

ORDERED that Counts III, IV, VI, VIII, IX, X, XI, XII, and XIII of the complaint in *American Federation of Government Employees, AFL-CIO v. Garfinkel*, Civil Action No. 87-2412-OG be, and hereby are, dismissed.

/s/

United States District Judge
Oliver Gasch

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FOREIGN SERVICE ASSOCIATION,	)	
REPRESENTATIVE JACK BROOKS,	)	
REPRESENTATIVE BARBARA BOXER,	)	
SENATOR CHARLES GRASSLEY,	)	
SENATOR WILLIAM PROXMIRE,	)	
SENATOR DAVID PRYOR,	)	
REPRESENTATIVE PAT SCHROEDER,	)	
and	)	Civil Action
REPRESENTATIVE GERRY SIKORSKI,	)	No. 88-0440-OG
Plaintiffs,	)	(Judge Gasch)
v.	)	
STEVEN GARFINKEL, DIRECTOR,	)	
Information Security Oversight	)	
Office,	)	
WILLIAM H. WEBSTER,	)	
Director of Central Intelligence,	)	
and	)	
GEORGE P. SHULTZ,	)	
Secretary of State,	)	
Defendants.	)	

NOTICE OF APPEAL

Plaintiffs, American Foreign Service Association, Representative Jack Brooks, Representative Barbara Boxer, Senator Charles Grassley, Senator William Proxmire, Senator David Pryor, Representative Pat Schroeder, and Representative Gerry Sikorski hereby appeal to the United States Supreme Court under 28

U.S.C. § 1252 from the order dismissing this case entered and filed on May 27, 1988.

/s/

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Dated: June 3, 1988

CERTIFICATE OF SERVICE

I, Patti A. Goldman, an attorney for plaintiffs, hereby certify that I have caused a copy of plaintiffs' notice of appeal to be served on defendants on this 3rd day of June, 1988, by having a copy hand-delivered to:

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/s/
Patti A. Goldman

(2)

Supreme Court, U.S.
FILED
OCT 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2127

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION, ET AL.,
APPELLANTS

v.

STEVEN GARFINKEL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTION PRESENTED

Section 630 of the Treasury, Postal Service and General Appropriations Act for fiscal year 1988 provides that no funds appropriated for that fiscal year may be expended for the implementation or enforcement of any policy, form or agreement concerning the nondisclosure of classified information if the policy, form or agreement (a) contains the term "classifiable" or concerns information other than that which is marked classified or is known by the employee to be classified or to be in the process of a classification determination, or (b) requires prior authorization for an employee to furnish classified information to Congress. The question presented is:

Whether the Court should affirm the district court's judgment denying appellants' request for declaratory or injunctive relief that would bar the enforcement of nondisclosure agreements under Section 630, when recent steps taken by the Executive Branch make clear that appellants are not entitled to relief under certain provisions of Section 630, and the remaining provisions of Section 630 are unconstitutional to the extent they categorically prevent the President from requiring prior authorization before subordinate Executive Branch employees may disclose classified information to a Member of Congress.[1]

---

[1] A second question presented on page i of the Jurisdictional Statement is whether the appellants who are individual Members of Congress have standing to seek declaratory or injunctive relief barring implementation or enforcement of nondisclosure forms by Executive Branch agencies. The district court held that they do not (J.S. App. 13a-14a). Appellants do not address the congressional standing question in the body of the Jurisdictional Statement, and we do not believe that the Court must reach it in order to affirm the district court's judgment. See note 22, *infra*.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Argument	14
Conclusion	28
Appendix A	1a
Appendix B	4a

TABLE OF AUTHORITIES

Cases:

CIA v. *Sims*, 471 U.S. 159 (1985)	4
Cannon v. *University of Chicago*, 441 U.S. 677 (1979)	28
Cole v. *Young*, 351 U.S. 536 (1956)	17
Connick v. *Myers*, 461 U.S. 138 (1983)	26
Department of the Navy v. *Egan*, No. 86-1552 (Feb. 23, 1988)	2, 15, 16, 21, 22
Eccles v. *Peoples Bank*, 333 U.S. 426 (1948)	28
Goldwater v. *Carter*, 444 U.S. 996 (1979)	16
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944)	28
Hewitt v. *Helms*, No. 85-1630 (June 19, 1987)	28
Humphrey's Executor v. *United States*, 295 U.S. 602 (1935)	16
Kleppe v. *New Mexico*, 426 U.S. 529 (1976)	28
Longshoremen v. *Boyd*, 347 U.S. 222 (1954)	28
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)	16
Morrison v. *Olson*, No. 87-1279 (June 29, 1988)	22
New York Times Co. v. *United States*, 403 U.S. 713 (1971)	16
Public Affairs Press v. *Rickover*, 369 U.S. 111 (1962)	28
Snepp v. *United States*, 444 U.S. 507 (1980)	4, 16, 17
Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984)	26
Totten v. *United States*, 92 U.S. 105 (1875)	16
Touhy v. *Ragen*, 340 U.S. 462 (1951)	23, 25, 26

Cases – Continued: Page

United States v. *AT&T*, 567 F.2d 121 (D.C. Cir. 1977) ... 25
United States v. *Curtiss-Wright Corp.*, 299 U.S. 304 (1936) ... 16, 24
United States v. *Nixon*, 418 U.S. 683 (1974) ... 21, 25
United States v. *Pink*, 315 U.S. 203 (1942) ... 16
United States v. *Reynolds*, 345 U.S. 1 (1953) ... 16, 25
United States v. *Robel*, 389 U.S. 258 (1967) ... 16
United States v. *United States District Court*, 407 U.S. 297 (1972) ... 16
Webster v. *Doe*, No. 86-1294 (June 15, 1988) ... 4, 16, 17, 22, 28
Weinberger v. *Salfir*, 422 U.S. 749 (1975) ... 27

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 1 ... 16
Art. I, § 8, Cl. 8 (Copyright Clause) ... 12
Art. II ... 2, 3, 10, 24, 1a
§ 1 ... 16, 1a
Cl. 8 ... 14, 1a
§ 2 ... 16
§ 3 ... 22, 1a
Amend. I ... 4, 6, 11, 12, 18

Act of July 3, 1980, Pub. L. No. 96-303, § 3, 94 Stat. 855 ... 12

Administrative Procedure Act, 5 U.S.C. 706(2) ... 12

Continuing Appropriations Act, Pub. L. No. 100-202, 101 Stat. 1329-390 ... 7
§ 102(m), 101 Stat. 1329-432 (§ 630) ... *passim* 2a-3a

Freedom of Information Act, 5 U.S.C. 552 ... 12

National Security Act of 1947, ch. 343, 61 Stat. 495 ... 3
§ 102(d)(3), 50 U.S.C. 403(d)(3) ... 3-4

Treasury, Postal Service and General Appropriations Act of 1989, Pub. L. No. 100-440, 102 Stat. 1721 ... 14

5 U.S.C. 1206(c)(1)(A) ... 11-12

5 U.S.C. 2302(b) ... 23

5 U.S.C. 2302(b)(8)(A) ... 11, 22

Statutes and regulations – Continued: Page

5 U.S.C. 2302(b)(8)(B) 23
5 U.S.C. 7211 12
50 U.S.C. 501 27
Exec. Order No. 10290, 3 C.F.R. 789 (1949-1953 Comp.) 2
Exec. Order No. 10501, 3 C.F.R. 979 (1949-1953 Comp.) 2
Exec. Order No. 11652, 3 C.F.R. 678 (1971-1975 Comp.) 2
Exec. Order No. 12065, 3 C.F.R. 190 (1979 Comp.) 2
Exec. Order No. 12334, 3 C.F.R. 216 (1981 Comp.) 26
Exec. Order No. 12356, 3 C.F.R. 166 (1982 Comp.) 2, 3, 5, 18
32 C.F.R.:
Sections 2001-2003 3
Section 2003.20 ..... 6, 13
Section 2003.20(a) 13
Section 2003.20(b) 13
Section 2003.20(h)(1) 13
Section 2003.20(h)(1)(i) 7
Section 2003.20(h)(3) 13, 21

Miscellaneous:

6 Annals of Cong. 613 (1800) 16
Classified Information Nondisclosure Agreements: Hearing before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service, 100th Cong., 1st Sess. (1987) 18, 19
Developments in the Law – The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130 (1972) 17
Director of Central Intelligence, Security Committee, *Sensitive Compartmented Information: Characteristics and Security Requirements* (June 1984) 4
47 Fed. Reg. 14874 (1982) 2

Miscellaneous—Continued: Page

52 Fed. Reg. (1987):
p. 28802 7
p. 29793 7
p. 48367 ..... 7, 21
53 Fed. Reg. (Sept. 29, 1988):
p. 38278 13
p. 38279 21
S. Rep. 99-522, 99th Cong., 2d Sess. (1986) 27
24 Weekly Comp. Pres. Docs. 1189 (Sept. 22, 1988) 14

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2127

AMERICAN FOREIGN SERVICE ASSOCIATION, ET AL.,
APPELLANTS

v.

STEVEN GARFINKEL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of Steven Garfinkel, Director of the Information Security Oversight Office; William H. Webster, Director of Central Intelligence; and George P. Shultz, Secretary of State, respectfully moves that the judgment of the district court in this case be affirmed.

OPINIONS BELOW

The opinion of the district court dated May 27, 1988 (J.S. App. 1a-36a) is reported at 668 F. Supp. 671, and the opinion of the district court in two related cases dated July 29, 1988 (App., *infra*, 4a-24a) is not yet reported.

JURISDICTION

The judgment of the district court (J.S. App. 37a-38a) was entered on May 27, 1988. The notice of appeal to this Court was

filed on June 3, 1988 (J.S. App. 39a-40a), and the jurisdictional statement was docketed on June 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of Article II of the Constitution and Section 630 of the Treasury, Postal Service and General Appropriations Act, 1988 (as enacted by Section 102(m) of the Continuing Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-390, 1329-432), are reproduced at App., *infra*, 1a-3a.

STATEMENT

1. The President has the responsibility and authority under Article II of the Constitution to classify and control access to information bearing on the national defense and foreign relations of the United States and to determine whether an individual is sufficiently trustworthy to be granted access to such information. This authority "exists quite apart from any explicit congressional grant." *Department of the Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988), slip op. 8; see pages 15-17, *infra*.

As the Court observed in *Egan* (slip op. 9), the Executive Branch has engaged in systematic efforts since World War I to protect national security information; and since World War II, these efforts have been formalized in a series of Executive Orders. See Exec. Order No. 10290, 3 C.F.R. 789 (1949-1953 Comp.); Exec. Order No. 10501, 3 C.F.R. 979 (1949-1953 Comp.); Exec. Order No. 11652, 3 C.F.R. 678 (1971-1975 Comp.); Exec. Order No. 12065, 3 C.F.R. 190 (1978 Comp.). The most recent such directive, Executive Order No. 12356, was issued by President Reagan in 1982. 47 Fed. Reg. 14874, 3 C.F.R. 166 (1982 Comp.).

Executive Order 12356 provides for three levels of classification – Top Secret, Secret, and Confidential – based upon the extent of the harm to the national security that could be expected to result from unauthorized disclosure (§ 1.1(a)). The classified status of information generally is to be marked on the face of the document (§ 1.5). If there is reasonable doubt about the

need to classify information, it must be safeguarded as if it were classified pending a classification determination, which must be made within 30 days (§ 1.1(c); see also § 1.2(e)). A person is eligible for access to classified information only if he has been found by a responsible agency official to be trustworthy and only if access "is essential to the accomplishment of lawful and authorized Government purposes" (§ 4.1(a)). Each agency must establish controls to ensure that classified information is used, reproduced, transmitted and destroyed under conditions that will provide adequate protection and prevent access by unauthorized persons (§ 4.1(b)), and classified information may not be disseminated outside the Executive Branch except under conditions that ensure that it will be given equivalent protection (§ 4.1(c)). Agency heads also may create special access programs to protect "particularly sensitive" information (§ 4.2). Officers and employees of the Government (and contractors, licensees, and grantees) are subject to appropriate sanctions if they "knowingly, willfully, or negligently" disclose classified information to unauthorized persons (§ 5.4(b)(1)). Sanctions may include reprimand, suspension without pay, removal, and loss or denial of access to classified information (§ 5.4(c)).

The President directed the National Security Council to provide overall policy direction for the information-security program established by Executive Order 12356, but responsibility for implementation of that program and monitoring for compliance is vested in the Director of the Information Security Oversight Office (ISOO) in the General Services Administration (§ 5.1). The President conferred on the Director of ISOO the authority, inter alia, "to prescribe, after consultation with affected agencies, standard forms that will promote the implementation of the information security program" (§ 5.2(b)(7)). See also 32 C.F.R. 2001-2003.

2. In addition to the foregoing measures instituted by the President pursuant to his inherent authority under Article II of the Constitution, Congress specifically provided when it passed the National Security Act of 1947, ch. 343, 61 Stat. 495, that the Director of Central Intelligence (DCI) "shall be responsible for

protecting intelligence sources and methods from unauthorized disclosure" (50 U.S.C. 403(d)(3)). That provision confers broad authority on the DCI to ensure the confidentiality of this especially sensitive information. See *Webster* v. *Doe,* No. 86-1294 (June 15, 1988), slip op. 7-8; *CIA* v. *Sims*, 471 U.S. 159, 170-173 (1985); *Snepp* v. *United States,* 444 U.S. 507, 509 (1980). The DCI has long required individuals who are granted access to information concerning the Central Intelligence Agency (CIA) or its intelligence sources and methods to sign a formal agreement not to disclose such information without prior authorization and to submit any material relating to such information for prepublication review. In *Snepp*, the Court found one of these agreements, which are not directly at issue here, to be an "entirely appropriate" exercise of the DCI's authority to protect intelligence sources and methods and sustained them against a First Amendment challenge (444 U.S. at 509 n.3).

In 1981, the DCI adopted Form 4193, which governs access to Sensitive Compartmented Information (SCI) (J.S. App. 3a n.4).[2] SCI is a subset of classified information involving intelligence sources and methods that consists of "data about sophisticated technical systems for collecting intelligence and the information collected by those systems." DCI Security Committee, *Sensitive Compartmented Information: Characteristics and Security Requirements* 1 (June 1984).[3] Because SCI is extremely vulnerable to countermeasures and compromise, access to such information is strictly controlled and limited only to those who have a need to know particular information. In addition, more stringent standards are applied in determining who may have access to SCI, such that individuals who have been granted access to Top Secret information may nonetheless be denied access to SCI. *Id.* at 1-4; Webster Decl. 2-3, 5-6. These

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[2] Form 4193 is reproduced as Exhibit 5 to Defendants' Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction [hereinafter "Defts' Opp."].

[3] Relevant excerpts from the DCI Security Committee's report are contained in Exhibit A to the Declaration of DCI William H. Webster [hereinafter "Webster Decl."], Defts' Opp., Exh. 4.

special protections for SCI are in accordance with the authorization in Section 4.2 of Executive Order No. 12356 for the DCI to establish special access programs governing particularly sensitive information pertaining to intelligence sources and methods. Webster Decl. 2.

As originally adopted in 1981, Form 4193 described SCI as information that "involves or derives from intelligence sources or methods and is classified or classifiable under the standards of Executive Order 12065 [the predecessor to the current Executive Order 12356] or other Executive order or statute" (¶ 1).[4] Any person who signed Form 4193 acknowledged that "direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of SCI * * * could cause irreparable injury to the United States or be used to advantage by a foreign nation" (¶ 3). The signatory accordingly agreed never to divulge SCI to anyone who is not authorized to receive it without the prior written authorization of the responsible agency (¶ 3) and to submit for security review all materials intended for publication that contain or purport to contain SCI or information relating to or derived from SCI (¶ 4). The signatory further acknowledged that he is obligated by law and regulation not to disclose any other classified information in an unauthorized fashion (¶ 3).

3. In 1982, in response to numerous improper disclosures of classified information, the President established a task force to recommend additional measures for the protection of classified information. The task force's recommendations were approved by the National Security Council and were adopted by the President in National Security Decision Directive (NSDD) 84 (Mar. 11, 1983), Defts' Opp., Exh. 1. NSDD 84 directs each Executive Branch agency to require any person who is to be granted access to classified information to sign a nondisclosure agreement as a condition of access (NSDD ¶ 1.a.). In addition, NSDD 84 requires the Director of ISOO to establish a standard nondisclosure form for use throughout the Executive Branch with

[4] Form 4193 has recently been clarified by substituting for the term "classifiable information" a description of the particular types of information to which that term was intended to refer. See page 13, *infra*.

respect to classified information other than SCI (¶ 1.c). Pursuant to the latter mandate, ISOO adopted Standard Form (SF) 189 in 1983. Defts' Opp., Exh. 2; 32 C.F.R. 2003.20. SF 189, like Form 4193, states that the signatory has been advised and is aware that "direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of classified information * * * could cause irreparable injury to the United States or could be used to advantage by a foreign nation," and the signatory therefore agrees never to divulge such information unless he has officially verified that the recipient has been properly authorized to receive it or he has been given written authorization by the responsible agency (¶ 3). As originally adopted in 1983, SF 189 defined the term "classified information," as used in the agreement, as "information that is either classified or classifiable under the standards of Executive Order 12356 or under any other Executive Order or statute" (¶ 1).[5]

4. On August 17, 1987, the National Federation of Federal Employees filed an action in the United States District Court for the District of Columbia seeking to enjoin the use of SF 189 or any other form using the word "classifiable" to describe the information that signatories are prohibited from disclosing. *NFFE* v. *United States*, Civ. No. 87-2284-OG. The plaintiffs contended, inter alia, that use of the term "classifiable" violates the First Amendment because it is ambiguous and overbroad and would permit an agency to classify information after the employee seeks to disclose it or has already done so. The American Federation of Government Employees filed a similar suit on September 1, 1987, challenging the use of the term "classifiable" in both SF 189 and Form 4193. *AFGE* v. *Garfinkel*, Civ. No. 87-2412-OG.

On December 21, 1987, while the *NFFE* and *AFGE* suits were pending, the Director of ISOO published a regulation in the *Federal Register* to clarify the meaning of the term "classifiable information" in SF 189. That regulation states that the term means:

> (a) Unmarked *classified* information, including oral communications; and (b) *unclassified* information that meets

[5] SF 189, like Form 4193, has recently been clarified by substituting more precise language for the term "classifiable." See page 13, *infra*.

> the standards for classification and is in the process of a classification determination.

32 C.F.R. 2003.20(h)(1)(i) (emphasis in original), as added, 52 Fed. Reg. 48367 (1987).[6]

5. a. One day after the Director of ISOO published the clarification of the term "classifiable," the President signed into law the 451-page, government-wide Continuing Appropriations Act for fiscal year 1988, Pub. L. No. 100-202, 101 Stat. 1329, which included the Treasury, Postal Service and General Appropriations Act, 1988, 101 Stat. 1329-390. Section 630 of the latter Act is a rider, added at the last minute, which purports to impose certain restrictions on the ability of Executive Branch agencies to protect classified information.

Section 630 provides that no funds appropriated in any Act for fiscal year 1988 "may be used to implement or enforce the agreements in Standard Forms 189 or 4193 of the Government or any other nondisclosure policy, form or agreement" that has certain characteristics identified in five succeeding subsections.[7] The first two of these subsections address the use of the term "classifiable" in SF 189 and Form 4193. They provide that appropriated funds may not be used to implement or enforce a policy, form or agreement that "contains the term 'classifiable' " or that "concerns information other than that specifically

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[6] The same regulation further explained (emphasis in original):

> "Classifiable information" does *not* refer to currently unclassified information that may be subject to possible classification at some future date, but is not currently in the process of a classification determination. Therefore, the only circumstances under which a party to SF 189 might violate its terms by disclosing *unclassified* information are when a party knows, or reasonably should know, that such information is in the process of a classification determination * * *.

ISOO had previously sought to clarify the meaning of "classifiable" information in notices published on August 3 and 11, 1987, before the *NFFE* and *AFGE* suits were filed. 52 Fed. Reg. 28802, 29793 (1987).

[7] Although Section 630 uses the term "Standard Form" to refer to both SF 189 and Form 4193, the latter is actually not a standard form subject to generally applicable requirements; it was issued pursuant to the special authorities of the DCI.

marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination" (101 Stat. 1329-432). The latter limitations parallel the categories of information to which SF 189 was limited in any event by virtue of the clarification of the term "classifiable" in the regulation published by the Director of ISOO on December 21, 1987, quoted at page 6-7, *supra*. Subsections (3) and (4) of Section 630 address provisions of nondisclosure policies, forms and agreements that may affect disclosures to Congress or its Members.[8] The last prohibition, subsection (5), provides that appropriated funds may not be used to implement or enforce a policy, form or agreement that "imposes any obligations or invokes any remedies inconsistent with statutory law" (101 Stat. 1329-432). A final proviso states that nothing in Section 630 shall affect the enforcement of those aspects of a nondisclosure policy, form or agreement that do not fall within subsections (1)-(5).

b. Appropriate Executive Branch officials promptly took steps to accommodate certain of the concerns reflected in Section 630. Appellee Garfinkel, the Director of ISOO, temporarily suspended further implementation of SF 189 pending advice from the Attorney General. Garfinkel Aff. ¶ 2 (Feb. 8, 1988).[9] He also directed the agencies using SF 189 to notify affected employees that any SF 189 executed after December 22, 1987, would be treated as voidable at the employee's request. Garfinkel Aff. ¶ 3. Similarly, on behalf of the DCI, Lt. General Edward J. Heinz, the Director of the Intelligence Community

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[8] Subsections (3) and (4) apply to a policy, form or agreement that "directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress," or that "interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress" (101 Stat. 1329-432).

[9] The Garfinkel affidavit was attached as Exhibit 7 to the Memorandum in Support of Plaintiffs' Motion For Preliminary Injunction [hereinafter "Pltfs' Mem."].

Staff, issued instructions stating that Form 4193 and any other SCI forms were only to be used when accompanied by a special addendum that read:

> The obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with the section entitled "Employee Disclosure Agreements" contained in P.L. 1000[*sic*]-202, Continuing Appropriations for Fiscal Year 1988, 22 December 1987, and other applicable law.

Heinz Decl. ¶ 4 (Feb. 9, 1988), Pltfs' Mem., Exh. 6.[10]

c. On March 18, 1988, the DCI replaced Form 4193 with Form 4355. Second Heinz Decl. ¶ 3 & Exh. A (Mar. 24, 1988). Form 4355 does not use the word "classifiable" in describing the SCI to which the signatory's nondisclosure obligation applies. Instead, consistent with subsection (1) of Section 630, Form 4355 describes SCI as information that "involves or derives from intelligence sources or methods and is classified [11] or is in the process of a classification determination under the standards of Executive Order 12356 or other Executive order or statute" (¶ 1). The signatory agrees under Form 4355 that he will never divulge anything marked SCI (or that he knows to be SCI) to anyone not authorized to receive it or without prior written authorization, and that it is his responsibility to consult with appropriate officials in order to ensure that he knows whether information that he has reason to believe might be SCI (or might be related to or derived from SCI) in fact is considered by the agency concerned to be SCI (¶ 2). Instructions issued by Lt. Gen. Heinz provide that agencies may permit persons who signed a Form 4193 (with the addendum) after December 21, 1987, to sign a Form 4355 in its place. Second Heinz Decl., Exh. B.

6. a. On February 19, 1988 (before the DCI issued Form 4355), the appellants herein—the American Foreign Service

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[10] This addendum also was added to the Defense Department's essentially equivalent SCI form, DD 1847-1.

[11] The term "classified" in Form 4355 refers to both marked and unmarked classified information.

Association and seven Members of Congress—filed the instant suit alleging that SF 189 and Form 4193 violate Section 630 of the Treasury, Postal Service and General Appropriations Act for fiscal year 1988. Appellants sought an order declaring that the DCI and the Secretary of State violated Section 630 by continuing to require employees to sign Form 4193 (even with the addendum) after December 22, 1987, and an injunction requiring appellees Garfinkel and Webster to instruct federal agencies (i) to notify all persons who signed an SF 189 or Form 4193 agreement after December 22, 1987, that the agreement is void, and (ii) to notify all employees who signed an SF 189 or Form 4193 agreement at any time in the past that the five terms specified in Section 630 would not be enforced during fiscal year 1988. Complaint 7-8. On March 16 and 17, 1988, the plaintiffs in *AFGE* and *NFFE* amended their complaints to add claims alleging violations of Section 630 as well, and the district court subsequently consolidated the three cases (J.S. App. 2a n.1).

b. The district court considered the consolidated cases in two steps. In the decision at issue here (J.S. App. 1a-36a), which was rendered on May 27, 1988, the court addressed the challenge presented in all three cases based on Section 630 of the 1988 appropriations act. The court did not actually decide whether the actions of the Executive Branch were consistent with Section 630; instead, it assumed for purposes of its decision that the defendant federal officials had violated Section 630, noting that the DCI continued to use Form 4193 after December 22, 1987, albeit with the addendum, until he adopted Form 4355 (J.S. App. 22a-23a n.16).

The district court nevertheless denied any relief under Section 630 because it held that Section 630 is an unconstitutional interference with the President's Article II power to protect national security information (J.S. App. 22a-27a).[12] The court

[12] On a threshold issue of justiciability, the court first held that those appellants who are Members of Congress lack standing to challenge appellees' actions under Section 630 because they can seek relief through the legislative process (J.S. App. 13a-14a). The court found, however, that appellant AFSA and the unions in *NFFE* and *AFGE* do have standing to challenge the form agreements under Section 630, because they alleged that some of their

noted that although Congress is not precluded from "activity relating to national security information" (*id.* at 23a), Section 630 "impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations" (*id.* at 27a). The court found subsections (3) through (5) particularly objectionable (*id.* at 26a), because those provisions, which govern communications with Congress and bar enforcement of agreements that impose obligations or invoke remedies inconsistent with statutory law, "permit the President to ensure the secrecy of national security information only by those means authorized by Congress" (*id.* at 27a). Accordingly, the court concluded, "[w]herever may be drawn the line between the political branches in the area of regulating access to national security information, section 630 surely falls within territory where it is not welcome" (*ibid.*). The court therefore granted summary judgment in favor of the appellees in the instant case, since appellants based their challenge to SF 189 and Form 4193 only on Section 630, and it dismissed the corresponding counts in the *NFFE* and *AFGE* complaints (J.S. App. 27a-28a, 37a-38a).[13]

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individual members have been chilled in the exercise of their First Amendment rights as a result of the continued implementation and threatened enforcement of the agreements (J.S. App. 14a-18a). The court further found that two of the three individual plaintiffs in *AFGE* who signed the forms in question prior to December 22, 1987, have standing to raise the Section 630 claim (*id.* at 18a-19a). Finally, the court held that the unions and individual plaintiffs in *NFFE* and *AFGE* have standing to challenge the constitutionality of the nondisclosure agreements under the First Amendment (*id.* at 20a-22a).

[13] The district court also rejected several additional claims advanced only by the plaintiffs in *NFFE* and *AFGE*. First, the district court held that the nondisclosure agreements do not violate the whistleblower provision of the Civil Service Reform Act, because that provision excepts from its coverage any disclosure by an employee of information that is " 'specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs' " (J.S. App. 30a-31a, quoting 5 U.S.C. 2302(b)(8)(A)) and because enforcement of the whistleblower provision is in any event committed to the Special Counsel of the Merit Systems Protection Board (see 5 U.S.C.

7. In a subsequent ruling (App., *infra,* 4a-24a), rendered in *NFFE* and *AFGE* on July 29, 1988 (after the notice of direct appeal to this Court was filed in the instant case), the district court held that the term "classifiable" as used in SF 189 and Form 4193 is not unconstitutionally vague under the First Amendment if its scope is clarified in accordance with the definition published in the *Federal Register* by the Director of ISOO in December 1987 (App., *infra,* 10a-20a). The court further held, however, that SF 189 and Form 4193 cannot be enforced with respect to "classifiable" information unless the employees who have signed those forms are individually informed of that clarification or the term "classifiable" is deleted from the agreements (*id.* at 20a).[14]

8. On September 29, 1988, the Director of ISOO published regulations in the *Federal Register* setting forth the manner in

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1206(c)(1)(A)) rather than a private right of action (J.S. App. 30a-31a). Second, the court rejected as frivolous claims that the nondisclosure agreements conflict with an uncodified code of ethics, Act of July 3, 1980, Pub. L. No. 96-303, § 3, 94 Stat. 855 (J.S. App. 31a-32a), the Copyright Clause of the Constitution, Art. I, § 8, Cl. 8 (J.S. App. 33a), and the Freedom of Information Act, 5 U.S.C. 552 (J.S. App. 34a). Third, the court dismissed for failure to state a claim under the Administrative Procedure Act (5 U.S.C. 706(2)) the contention that Form 4193 violates NSDD 84 (J.S. App. 32a). Fourth, the court ruled that differences between SF 189 and SF 189-A (a form used for employees of government contractors) are rational and therefore do not impermissibly discriminate against federal employees (J.S. App. 28a-30a).

[14] The court also rejected the contention by the *NFFE* and *AFGE* plaintiffs that the regulation published by ISOO in December 1987 violates the First Amendment because it bars negligent disclosures and disclosures of information that the employee should know is classified or in the process of a classification determination. The court explained that "[t]he reasonable person standard is the one to which people are held in all of their activities, and it does not become unconstitutionally vague simply because First Amendment rights are involved" (App., *infra,* 19a). Similarly, the court rejected the claim by the *AFGE* plaintiffs that the agreements violate 5 U.S.C. 7211—which provides that the right of employees to petition Congress or a Member of Congress, or to furnish information to a House, committee or Member of Congress, may not be interfered with or denied—because the plaintiffs failed to allege that they have disclosed or intend to disclose some classified or classifiable information to Congress and have for that reason been threatened with enforcement of the nondisclosure agreements (App., *infra,* 21a-22a).

which he will implement the district court's July 29, 1988, order. 53 Fed. Reg. 38278, amending 32 C.F.R. 2003.20. The regulations clarify paragraph 1 of all outstanding SF 189 agreements by substituting for the term "classifiable information" a more precise description of the categories of information to which that shorthand label was intended to refer: "unmarked classified information (including oral communications), and unclassified information that meets the standards for classification and is in the process of a classification determination" (32 C.F.R. 2003.20(h)(1)). The new ISOO regulations also state the basis on which an employee may be held liable for an unauthorized disclosure—namely, if he knew or reasonably should have known that the information he disclosed was classified or in the process of a classification determination (32 C.F.R. 2003.20(h)(3)). On September 26 and 30, 1988, instructions were issued on behalf of the DCI to clarify the existing Form 4193 agreements by substituting similar language for the term "classifiable" and to require appropriate government officials to notify employees who have signed that form of these changes. Pursuant to a further order of the district court entered on September 26, 1988, in *NFFE* and *AFGE*, the agencies must furnish individualized notice of the clarification to employees who have signed SF 189 and Form 4193 agreements by October 27, 1988.

In addition, on a prospective basis, the Director of ISOO has replaced SF 189 with SF 312, effective September 29, 1988 (32 C.F.R. 2003.20(a)). SF 312 omits the term "classifiable" and refers instead only to "classified" information (which includes unmarked classified information) and information that meets the standards for classification and is in the process of a classification determination. Any person who has signed an SF 189 will be permitted to sign an SF 312 if he wishes to do so (32 C.F.R. 2003.20(b)).[15]

9. Because Section 630 was enacted as a rider to an appropriations law for fiscal year 1988, it effectively expired on September 30, 1988. On September 22, 1988, however, the

[15] As explained above (see page 9, *supra*), Form 4193 was previously replaced on a prospective basis by Form 4355, which also omits the word "classifiable."

President, with serious reservations, signed the Treasury, Postal Service and General Appropriations Act, 1989, Pub. L. No. 100-440, 102 Stat. 1721. Section 619 of that Act contains restrictions on the expenditure of appropriated funds for the implementation or enforcement of nondisclosure policies, forms and agreements in fiscal year 1989 that are identical to those in Section 630 of the 1988 appropriations act. In signing the bill, the President noted his constitutional objections to Section 619, explaining that "[o]ur Nation's security depends upon our success in diplomatic, military, and intelligence activities, and that success depends upon our ability to protect the Nation's secrets" (24 Weekly Comp. Pres. Docs. 1189). The President further observed that he has "the constitutional responsibility to ensure the secrecy of information whose disclosure would threaten our national security" (*ibid.*). For these reasons, the President directed that in accordance with his sworn obligation to preserve, protect, and defend the Constitution (see Art. II, § 1, Cl. 8), Section 619 will be considered to be of no force and effect unless and until this Court reverses the ruling of the district court in the instant case holding the identical provisions in Section 630 of the 1988 Act unconstitutional (24 Weekly Comp. Pres. Docs. 1189).

ARGUMENT

The district court correctly denied appellants' request for declaratory and injunctive relief under Section 630 that would broadly bar enforcement of confidentiality obligations that have been solemnly undertaken by employees of the Executive Branch as a condition of access to information relating to the national security of the United States. The steps taken by the Director of Central Intelligence and the Director of the Information Security Oversight Office to substitute more precise language for the term "classifiable" in existing and future nondisclosure agreements meet the principal concerns that led to the enactment of Section 630 and eliminate any basis for appellants' contentions that the enforcement of existing nondisclosure agreements must be enjoined because they are inconsistent with subsections (1) and (2) of Section 630. Accordingly, in the present posture of this case, there is no ocassion for the Court to

consider broad questions concerning Congress's power to limit the types of information that may be protected by the President in the interest of national security or to specify the precise formulation of the nondisclosure obligations that the President may require of Executive Branch personnel.

The only remaining issue is appellants' contention that subsections (3)-(5) of Section 630 justify government-wide declaratory and injunctive relief barring enforcement of any limitations that the President might impose (through nondisclosure agreements) on the furnishing of classified information by Executive Branch employees to Members of Congress. However, the district court was clearly correct in holding that Congress may not categorically prevent the President from insisting that those employees who have access to highly sensitive information must at least seek the prior approval of a responsible official under the President's supervision before divulging national security information to anyone, including a Member of Congress. Indeed, in light of the serious constitutional questions raised, it is far from clear that Section 630 should be construed to have that effect. But if the Court does not reject appellants' position outright, on either constitutional or statutory grounds, it should nevertheless deny appellants' request for sweeping declaratory or injunctive relief in the highly abstract context of this case. This case does not involve any instance in which an Executive Branch employee actually sought but was denied authorization to make a particular disclosure to a Member of Congress, or was disciplined for making such a disclosure without seeking or obtaining prior authorization. For this reason alone, a court may properly deny equitable relief. The judgment of the district court denying such relief therefore should be affirmed.

1. a. The President has the "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information" (*Department of the Navy* v. *Egan,* slip op. 8). This authority "exists quite apart from any explicit congressional grant" (*ibid.*); it derives instead from the

President's constitutionally assigned roles as the head of the Executive Branch (and therefore the repository of the "executive Power" (Art. II, § 1)), as the "Commander in Chief of the Army and Navy of the United States" (Art. II. § 2),[16] and as the " 'sole organ of the nation in its external relations' " (*United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), quoting 6 Annals of Cong. 613 (1800) (remarks of John Marshall)).[17] In fact, the Court has repeatedly recognized that there is a " 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business." *Egan*, slip op. 8, quoting *Snepp* v. *United States*, 444 U.S. 507, 509 n. 3 (1980); see also *United States* v. *Robel*, 389 U.S. 258, 267 (1967); *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953); *Totten* v. *United States*, 92 U.S. 105, 106 (1875). See also *Webster* v. *Doe*, No. 86-1294 (June 15, 1988), slip op. 7-8.

The President's power to protect classified information and his status as the head of the Executive Branch and Commander-in-Chief necessarily confer on him the right to insist that those who serve as his agents[18] will exercise the utmost care in handling classified information and will seek and obtain the approval of responsible officials before disclosing it to others who have not already been specifically granted accesss to it. As Justice Stewart observed in his concurring opinion in *New York Times Co.* v. *United States*, 403 U.S. 713, 728-730 (1971):

> The responsibility [for protecting classified information] must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct

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[16] See also *United States* v. *United States District Court*, 407 U.S. 297, 310 (1972) (The President has "the fundamental duty, under Art. I, § 1, of the Constitution, to 'preserve, protect and defend the Constitution.' Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means.").

[17] See also *United States* v. *Pink*, 315 U.S. 203, 222-223, 228-230 (1942); *Goldwater* v. *Carter*, 444 U.S. 996, 1002-1006 (1979) (Rehnquist, J., concurring in the judgment).

[18] In the case of officers and employees of the Department of Defense, the Department of State, the CIA, and other entities who assist the President in the area of national defense and foreign relations, " 'their acts are his acts'." *Humphrey's Executor* v. *United States*, 295 U.S. 602, 631 (1935) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803)).

> of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. * * * [I]t is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibility in the fields of international relations and national defense.

See also *Cole* v. *Young*, 351 U.S. 536, 546 (1956). The Executive Orders issued by the President since World War II (see page 2, *supra*) have implemented the President's inherent constitutional authority to protect and control access to classified information, and they have codified the standards to which his subordinates are expected to adhere. See *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1192-1198 (1972).

b. After a thorough study within the Executive Branch, the President concluded in 1983 that nondisclosure agreements such as those at issue here serve essential functions in protecting information relating to the national security. Such agreements clearly define the personal obligations of the officers and employees who will be granted access to national security information, and assure that each employee fully appreciates the exacting nature of the trust relationship he is assuming with the United States Government and the consequences that may result from a breach of that trust. See *Snepp*, 444 U.S. at 510-511 & nn. 5-6, 515; *Webster* v. *Doe*, slip op. 7-8; Webster Decl. ¶ 8. For these reasons, the President required in NSDD 84 that all employees who have access to SCI and other classified information must sign a nondisclosure form as a condition of access. Just as this Court held in *Snepp* that such agreements are an "entirely appropriate" way for the DCI to implement his statutory duty to protect intelligence sources and methods from unauthorized disclosure (444 U.S. at 509 n.3), they are also an

entirely appropriate way for the President to implement his constitutional duty to protect classified information generally, by setting forth the standards to which Executive Branch employees would be held under Executive Order 12356 even in the absence of a written agreement. Appellants do not contend otherwise.

2. a. Although NSDD 84 caused some concerns in certain other respects, the final implementation of the government-wide nondisclosure form (SF 189) in 1983 did not generate significant public opposition. See *Classified Information Nondisclosure Agreements: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service,* 100th Cong., 1st Sess. 62-63, 76-77 (1987) [hereinafter *1987 Hearing*].[19] In 1987, however, some Executive Branch employees and Members of Congress began to express reservations regarding the use of the term "classifiable" in SF 189 (and Form 4193), because they believed that the term was vague and overbroad and therefore might impermissibly chill the exercise of First Amendment rights, and that the term might allow an agency to classify information after it has been disclosed, in order to punish the employee who disclosed it. It was those concerns that led to the filing of the *NFFE* and *AFGE* suits in August and September 1987 and to the last-minute insertion of Section 630 into the Continuing Appropriations Act for 1988 in December 1987. See note 20, *infra;* see generally *1987 Hearing* 1-3, 5, 8-17, 22, 42-44, 53-56, 59, 63, 76-79, 84, 94-98, 103-110, 112, 116, 122, 133, 148, 151-154. The clarification of the term "classifiable" by the Director of ISOO in his *Federal Register* notice dated December 21, 1987, was intended to alleviate those concerns.

More recently, the DCI and Director of ISOO have gone even further, completely eliminating the word "classifiable" from the existing SF 189 and Form 4193 and the new SF 312 and Form 4355. In its place, the DCI and Director of ISOO have substituted a more precise description of the three categories of

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[19] Unlike Forms 4193 and 4355 and the agreements at issue in *Snepp*, SF 189 and SF 312 do not contain a prepublication review requirement.

information to which the nondisclosure obligation applies: (i) information that is marked classified, (ii) information that is unmarked but classified (including oral communications), and (iii) information that is in the process of a classification determination. See pages 9 and 13, *supra*. These clarifications, of which all employees who signed SF 189 or Form 4193 will be notified, ensure that the agreements are narrowly drawn and will be fully understood by the signatories to apply only to those categories of information that are at the core of the President's constitutional duty to protect the national security. Because the word "classifiable" has been completely eliminated from the forms, there no longer is any live controversy in this case under subsection (2) of Section 630, which purports to render that term unenforceable. And because the three categories of information specified by the DCI and the Director of ISOO are the same as those specified in subsection (1) of Section 630 as proper subjects of nondisclosure agreements, the recent clarifications by the DCI and Director of ISOO also make clear that appellants are not entitled to any relief on their claim that the existing SF 189 and Form 4193 agreements cover information beyond that identified in subsection (1). The DCI and Director of ISOO therefore have fully met the principal concerns that led to the enactment of Section 630.[20]

In light of these steps taken by the responsible Executive Branch officials, which have the effect of bringing nondisclosure forms into harmony with the first two subsections of Section 630, there is no occasion in this case for the Court to address broad questions concerning the power of Congress to circumscribe the types of information relating to the national security that the President may constitutionally require his sub-

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[20] That these were Congress's principal concerns is evident from the fact that Senator Grassley, a leading congressional critic of the word "classifiable" in then-existing forms, had sought to resolve the controversy by proposing a definition identical to that subsequently published by the Director of ISOO (see *1987 Hearing* 10-12, 101) and, as noted in the text, subsection (1) of Section 630 manifests agreement with that definition. See also Affidavit of Senator Charles E. Grassley at 2-4 (Nov. 18, 1987), Pltfs' Mem., Exh. 11.

ordinates to keep confidential.[21] Nor is there any occasion for the Court to consider the power of Congress to prescribe the details or modify the enforceability of particular nondisclosure agreements.

b. Appellants note in passing (J.S. 12-13) that subsection (1) of Section 630 permits the use of appropriated funds to implement or enforce a policy, form or agreement only if it concerns information that is specifically marked as classified or that is unmarked but is "known" by the employee to be classified or in the process of a classification determination. It is unclear whether appellants' references to the word "known" are intended to constitute a challenge to the district court's judgment insofar as it would permit the President to insist that employees not disclose sensitive information that they do not actually know but *should* know is classified or in the process of a classification determination. Any such challenge, however, would be without merit for several reasons.

First, appellants' objection, to the extent they raise it, should not be considered in the context of this case, which presents a challenge to the content of the forms themselves. Forms SF 189 and SF 312 do not address the question of the standard of care required of an employee in handling information protected by the Executive Order. The standard of care is instead discussed in regulations issued by the Director of ISOO. Those regulations provide that a person who has signed an SF 189 or 312 "may be liable for disclosing 'classified information' only if he or she

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[21] Contrary to appellants' contention (J.S. 11), the district court did not "essentially preclude[] Congress from placing any restrictions on the Executive Branch's power to limit the disclosure of national security information, even if such information has not been classified under the President's own classification rules." The district court stated that even the government's position "does not preclude congressional activity relating to national security information" (J.S. App. 23a). Moreover, by the time of the district court's decision, the DCI and Director of ISOO had clarified the nondisclosure-agreement forms to make clear that they apply only to information that is protected by the Executive Order. See pages 6-7, 9, *supra*.

knows or reasonably should know" that unmarked information is classified or meets the standards for classification and is in the process of a classification determination. 32 C.F.R. 2003.20(h)(3), as added, 53 Fed. Reg. 38279 (Sept. 29, 1988); see also 52 Fed. Reg. 48367 (1987). Form 4355 takes a slightly different approach: it states that an employee may not disclose information that he knows to be classified or in the process of a classification determination, but it imposes on the employee a duty to ascertain the status of any information that he has reason to believe might be SCI or related to or derived from SCI (¶ 3). Finally, Form 4193 simply states that negligent handling of SCI could cause irreparable injury to the United States; it does not spell out in detail the circumstances in which measures might be taken against a person who discloses information. Thus, if appellants actually intend to argue that subsection (1) of Section 630 absolves an employee of any legal obligation unless he actually *knows* that information is classified or meets the standards for classification and is in the process of a classification determination, that argument should be directed not to the forms themselves, but to any measures that might be taken in the future against an employee who makes an unauthorized disclosure. Issues concerning such measures are not ripe for resolution in the abstract posture of this case. See pages 27-28, *infra*.

In any event, appellants are surely wrong if they do intend to argue that Congress may constitutionally bar the President from disciplining an Executive Branch employee—or even denying him further access to classified information—if the employee makes an unauthorized disclosure of national security information that is "only" negligent or reckless. As we have explained above (see pages 15-17, *supra*), the Constitution itself confers on the President the authority to classify and control access to information bearing on the national defense and foreign relations of the United States. " 'As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities' " (*Egan*, slip op. 11, quoting *United States* v. *Nixon*, 418 U.S. 683, 710 (1974)). The courts therefore cannot lightly disable the President from taking measures that

he concludes are necessary to protect such information—including measures designed to prevent negligent or reckless as well as knowing disclosures. The Constitution expressly imposes a duty on the President to "take Care" that the laws be faithfully executed (Art. II, § 3). In order to fulfill that obligation, the President must have the ability to impose a comparable duty of care on the subordinate Executive Branch employees who serve as his agents. Even where the President's power to remove Executive Branch officers is subject to limitation by Congress, the President's duty to "take Care" requires at a minimum that he be able to remove (or to direct the removal of) a subordinate official for "cause." See *Morrison* v. *Olson*, No. 87-1279 (June 29, 1988), slip op. 33-34. The careless handling of national security information by an employee holding a position of the highest degree of trust would unquestionably be "cause" for some disciplinary action, and such conduct would also be an appropriate basis for denying the employee further access to national security information. See *Webster* v. *Doe*, slip op. 7-8; *Egan*, slip op. 8-11. The court below therefore correctly declined to grant declaratory or injunctive relief that would broadly and peremptorily frustrate the President's ability to take measures that will ensure that Executive Branch employees are punctilious in protecting the confidentiality of classified information.

3. All that remains, then, is appellants' contention (J.S. 13-14, 18-19) that Section 630 justifies the award of broad declaratory and injunctive relief barring enforcement of the nondisclosure-agreement forms insofar as they prohibit Executive Branch employees from furnishing national security information to Members of Congress without seeking prior approval of the Executive Branch officials who are ultimately responsible for such information. Appellants principally rely on subsection (3) of Section 630, which bars the expenditure of appropriated funds to implement or enforce any nondisclosure policy, form or agreement that "directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with members of Congress in a

secure manner as provided by the rules and procedures of the Congress."[22] For a number of reasons, this provision does not furnish a basis for the relief appellants seek.

a. First, Congress plainly does not have the constitutional authority to adopt a categorical rule that would absolutely bar

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[22] Subsections (4) and (5) do not support appellants' argument in this respect. Subsection (4) provides that appropriated funds may not be spent for the implementation of any policy, form or agreement that "interferes with the right of Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress." As an initial matter, no claim under subsection (4) is properly before the Court, because appellant AFSA and its members do not have standing to raise a claim concerning the right of Congress to receive information, and individual Members of Congress do not have standing to vindicate the rights of Congress as a whole (see J.S. App. 13a-14a). Moreover, as the district court recognized (J.S. App. 26a), the requirement that an employee obtain prior approval before he discloses information to anyone, including a Member of Congress, does not interfere with any "right" of Congress to receive information from the Executive Branch. Any "right" of Congress in this regard must ultimately be vindicated through official channels, such as by the issuance of a subpoena, which will trigger a response from the agency head or other authorized official. Cf. *Touhy* v. *Ragen*, 340 U.S. 462 (1951). Therefore, even if appellants had standing to raise this claim, they would not be entitled to relief under subsection (4).

Subsection (5) of Section 630 provides that appropriated funds may not be used for any policy, form or agreement that "imposes any obligations or invokes any remedies inconsistent with statutory law." The statutory law upon which appellants rely (J.S. 14, 19) is the whistleblower provision of the Civil Service Reform Act which—although it does not protect an employee who discloses classified information (5 U.S.C. 2302(b)(8)(A))—does provide that it "shall not be construed to authorize * * * the taking of any personnel action against an employee who discloses information to the Congress" (5 U.S.C. 2302(b) (final sentence)). The quoted language, however, does not affirmatively confer a right on an employee to disclose classified information to Congress or afford protection to an employee who does so, and indeed the whistleblower provision itself (5 U.S.C. 2302(b)(8)(A) and (B)) does not even expressly refer to disclosures to Congress. Because the requirement that an Executive Branch employee receive prior authorization before divulging national security information to a Member of Congress therefore does not conflict with the whistleblower statute, it does not conflict with subsection (5) of Section 630. For this reason, the district court properly declined to enter declaratory or injunctive relief based on that subsection.

the President from insisting that subordinate officers and employees in the Executive Branch must seek prior authorization before transmitting classified information to anyone, including a Member of Congress, who has not already been officially authorized to receive it. Such a rule would be nothing less than a frontal assault on the President's constitutional authority to exercise control over national security information in the Executive Branch and over communications with the coordinate Branches regarding such information.

Under the Constitution, the decision whether to disclose national security information to a person who has not already been authorized to receive it does not rest with each individual employee or former employee of the CIA or other government agency, acting alone. Such decisions are the responsibility of the President or by the Executive Branch officials who have been formally charged by the President with acting as his principal agents in the areas of national defense and foreign relations, with protecting sensitive information acquired in the course of that activity, and with supervising the activities of the lower-level employees who have been granted access to the information. Only in this way can the President and his principal advisers be responsible—and thereby be held accountable—for decisions concerning the disclosure of classified information, as well as all other decisions made in the performance of these functions that Article II assigns to the President.

As this Court explained in *Curtiss-Wright*, 299 U.S. at 320:

> [The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of

> the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted.

This constitutionally based privilege for national security information is well recognized in modern cases (see *United States* v. *Nixon*, 418 U.S. 683, 710-711 (1974); *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953)), and, in accordance with the precedent established by President Washington, applies in full measure to the President's relations with Congress. *United States* v. *AT&T*, 567 F.2d 121, 129 (D.C. Cir. 1977).

Because the privilege derives from the President's constitutional authority, the determination whether to invoke it and how to furnish information if it is not invoked must ultimately reside with the President or the head of the department or agency under the President's direct supervision, not with a low-level employee acting entirely on his own. In *Touhy* v. *Ragen*, *supra*, the Court sustained regulations issued by the Attorney General that barred an individual employee of the Department of Justice, without prior authorization, from furnishing official information of the Department in response to a judicial subpoena. The Court explained (340 U.S. at 468):

> When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious.

A fortiori, these same considerations require a centralized determination of whether sensitive information affecting the national security will be disclosed to persons who have not already been specifically authorized to receive it. See *Reynolds*, 345 U.S. at 7-8 (state secret or military privilege cannot be waived by private party and must be invoked by head of agency). These considerations are not rendered inapplicable merely because the disclosure would be made to Congress, rather than the courts. Congress could not, for example, have constitutionally cir-

cumvented President Washington's decision to withhold documents containing his instructions to the negotiators of the Jay Treaty by enacting a law that purported to confer a "right" on lower-ranking Executive Branch employees (perhaps the negotiators themselves) to furnish the information to Congress without prior authorization by the President, and purported to bar the President from taking any measures against an employee who exercised that "right."

For the foregoing reasons, the Court should reject appellants' reliance on Section 630 in support of their facial challenge to the nondisclosure forms insofar as those forms require prior authorization before an Executive Branch employee may divulge national security information to a Member of Congress.

b. Second, especially in view of the grave constitutional questions that are raised by appellants' argument, it is far from clear that subsection (3) should be read to *confer* a "right" on an Executive Branch employee to divulge national security information to a Member of Congress at will, without even attempting to invoke established channels of official communication. Subsection (3) instead can be read simply to take as a given (and to afford protection to) whatever "right" to petition or supply information to Congress that an individual might derive from some independent legal source, such as the First Amendment. If subsection (3) is read in this way, it is necessary to look outside of that provision to determine whether an Executive Branch employee has such a right.

Surely the First Amendment does not confer an unfettered right on an employee of the Executive Branch to disclose whatever national security information he pleases outside authorized channels, whether to a member of the public or to a Member of Congress. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984); *Touhy* v. *Ragen*, 340 U.S. 462 (1951); cf. *Connick* v. *Myers*, 461 U.S. 138 (1983). Specifically, the executive departments and agencies have inspectors general or other officials to whom federal employees may communicate information concerning activities that they believe to be unlawful. See also Exec. Order No. 12334, 3 C.F.R. 216 (1981 Comp.)(establishing the President's Intelligence Oversight Board). The departments and

agencies also have officials who are authorized to consider an employee's request to declassify information. Those mechanisms furnish employees with procedures for the reporting of improper activities and petitioning their government. Moreover, if an employee seeks official approval to communicate information to Congress, there is no reason to believe that such approval will neccessarily be denied. Indeed, the provision for prior approval serves important functions by affording the agency itself an opportunity to correct the problem the employee has identified (cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 765-766 (1975)) and to assure that any communication to Congress is channeled in a manner that minimizes the security risk. Compare 50 U.S.C. 501; cf. S. Rep. 99-522, 99th Cong., 2d Sess. 91, 94 (1986). There accordingly is no basis for concluding that a requirement that an employee seek prior approval before communicating classified information to anyone, including a Member of Congress, violates any First Amendment "right" of an Executive Branch employee. Such a requirement therefore does not violate subsection (3) of Section 630, if construed in the manner suggested herein.

c. Finally, even if subsection (3) of Section 630 is construed to confer a statutory right on all Executive Branch employees to communicate classified information directly to Members of Congress without prior authorization, the Court could deny appellants relief on equitable grounds without holding subsection (3) unconstitutional. Appellants assert an absolute statutory right that would intrude deeply into the constitutional authority of the President, discussed above (see pages 15-17, *supra*), to supervise his agents in the Executive Branch and their handling of national security information. At the very least, that argument raises profound separation-of-powers concerns. Yet appellants advance it in this case in an exceedingly abstract and speculative context, since the Court does not have before it any concrete instance in which an employee has sought but been denied authorization to disclose information to a Member of Congress or has been disciplined or denied further access to classified information because he made such a disclosure without seeking or obtaining prior approval.

The Court has repeatedly made clear that the award of injunctive or declaratory relief is not a matter of right, but rather is an equitable remedy committed to the sound discretion of the district court, in light of the public interests involved. See *Webster* v. *Doe*, slip op. 11; *id.* at 8 (Scalia, J., dissenting); *Hewitt* v. *Helms*, No. 85-1630 (June 19, 1987), slip op. 6-7; *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1948); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944). This case presents a compelling occasion for the courts to deny equitable relief, in accordance with the Court's traditional reluctance "to decide important questions regarding 'the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case.' " *Kleppe* v. *New Mexico*, 426 U.S. 529, 546 (1976) (quoting *Longshoremen* v. *Boyd*, 347 U.S. 222, 224 (1954)); see also *Public Affairs Press* v. *Rickover*, 369 U.S. 111, 112-113 (1962). That is especially so in view of the fact that the statutory provision upon which appellants rely is not permanent legislation that confers rights directly on private parties, but rather is written as a temporary restriction on the manner in which federal agencies may spend appropriated funds. Compare *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-693 (1979). Accordingly if the Court does not reject appellants' claim outright, as a matter of either constitutional law or statutory construction, it nevertheless should, on equitable grounds, affirm the district court's judgment denying appellants' claim for sweeping declaratory and injunctive relief.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article II of the United States Constitution provides in relevant part:

> SECTION 1. The executive Power shall be vested in a President of the United States of America. * * *
>
> * * * * *
>
> [Clause 8.] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: —"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."
>
> SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * *
>
> [Clause 2.] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; * * *
>
> * * * * *
>
> SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; * * * he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, * * *.

2. Section 630 of Treasury, Postal Service and General Appropriations Act, 1988, 101 Stat. 1329-432,[1] provides:

> No funds appropriated in this resolution or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 or 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:
>
> (1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination;
>
> (2) contains the term "classifiable";
>
> (3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;
>
> (4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;

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[1] The Treasury, Postal Service and General Appropriations Act, 1988, was enacted by Section 102(m) of the Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329-390.

(5) imposes any obligations or invokes any remedies inconsistent with statutory law: *Provided,* That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)-(5) of this section.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-2284-OG

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Civil Action No. 87-2412-OG

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, ET AL., PLAINTIFFS

v.

STEVEN GARFINKEL, ET AL., DEFENDANTS

[Filed July 29, 1988]

MEMORANDUM

In lengthy complaints, plaintiffs in these consolidated cases[1] allege numerous violations of the Constitution and

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[1] Hereinafter, *National Federation of Federal Employees v. United States*, Civil Action No. 87-2284 (D.D.C. filed Aug. 17, 1987) shall be referred to as *NFFE* and *American Federation of Government Em-*

statutes by reason of a federal government program that requires federal employees to sign agreements in which the employees pledge not to disclose classified information without authorization. The plaintiffs are two labor unions that represent many federal employees and three individuals who have signed or been directed to sign one of these agreements. In a memorandum and order filed May 27, 1988, the Court substantially pared the complaints, leaving claims under the First and Fifth Amendments to the Constitution, the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and 5 U.S.C. § 7211, which guarantees to federal employees the right to petition Congress.

Before the Court are defendants' Motion to Dismiss, plaintiffs' Motion for Summary Judgment, and plaintiff Brase's further Motion for Summary Judgment. Because the Court has considered evidence extrinsic to the pleadings and the parties have had adequate opportunity to make such submissions, the defendants' Motion to Dismiss will be treated as a Motion for Summary Judgment. *See Sacks v. Reynolds Securities, Inc.*, 593 F.2d 1234, 1239 (D.C. Cir. 1978); Fed. R. Civ. P. 12(b). The Court's action on these motions will resolve all of plaintiff's remaining claims.

I. BACKGROUND

In August and September of 1987, plaintiffs filed these cases to enjoin implementation and enforcement of the provisions of federal government Standard Forms 189 ("SF 189") and 4193 ("SF 4193") and Department of Defense form DD 1847-1. With important differences, these forms contain an agreement that imposes civil sanctions on the federal employee signatory for making unauthor-

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Employees v. Garfinkel, Civil Action No. 87-2412 (D.D.C. filed Sep. 1, 1987) shall be referred to as *AFGE*.

ized disclosures of certain government information. The SF 189 is used generally throughout the Executive Branch and is administered by the Information Security Oversight Office ("ISOO"). Exhibit 3 to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction. The Director of Central Intelligence ("DCI") uses the SF 4193 for employees who have access to Sensitive Compartmented Information ("SCI").[2] Exhibit 5 to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction. The DD 1847-1 is essentially the same as the SF 4193 and is presented to the same type of employees. Exhibit 4 to Defendants' Motion to Dismiss (filed Dec. 15, 1987).

The forms were prepared after a report by an Interdepartmental Committee of the Executive Branch suggested that civil penalties would deter unauthorized revelation of classified information. REPORT OF THE INTERDEPARTMENTAL GROUP ON UNAUTHORIZED DISCLOSURES OF CLASSIFIED INFORMATION A-6 (Mar. 31, 1982); *see* National Security Decision Directive 84 ¶ 1 (Mar. 11, 1983) [hereinafter NSDD 84]. The nondisclosure agreements embodied in the forms became a part of the Executive's comprehensive scheme for safeguarding national security information—a scheme that has its roots in the early years of this century. *See* Exec. Order No. 12,356, *reprinted in* 47 Fed. Reg. 14,874 (Apr. 2, 1982) [hereinafter Exec. Order 12,356]; *see also Developments in the Law—The National Security Interest and Civil Liberties,* 85 HARV. L. REV. 1130, 1193-94 (1972) (as early as World War I, Executive implemented scheme to protect national security

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[2] Both the SF 4193 and the DD 1847-1 refer expressly to SCI. Although such information is a subcategory of classified information, the distinction is generally not relevant to plaintiffs' claims. Throughout this memorandum, SCI will be distinguished from the general category of classified information only when the distinction is material.

information). Plaintiffs attack this recent addition to the scheme on the grounds that certain language in the forms impermissibly intrudes upon the First and Fifth Amendment rights of signatories to the forms. Of less substantial dimension are plaintiffs' additional claims that promulgation of the forms was arbitrary, capricious, and contrary to law, 5 U.S.C. §§ 701-706, and that the restrictions imposed by the forms violate a statutory assurance that federal employees may communicate with Congress without interference. 5 U.S.C. § 7211.

In all, three provisions of the forms are the subject of these constitutional and statutory challenges. First, each of the forms uses the term "classifiable" to describe the type of information that implicates the obligations imposed by the forms. The SF 189, for example, states:

> As used in this Agreement, *classified information is information that is either classified or classifiable under the standards of Executive Order 12356,* or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security.

SF 189 ¶ 1 (emphasis added). Also common to the forms is paragraph three which suggests that "indirect unauthorized disclosure" of classified information is a violation of the federal employee's obligation to protect such information. Finally, the SF 4193 and DD 1847-1 contain a prepublication review provision:

> In consideration of being granted access to Sensitive Compartmented Information and of being assigned or retained in a position of special confidence and trust requiring access to Sensitive Compartmented Information, I hereby agree to submit for security review by the Department or Agency that last authorized my access to such information, all information

> or materials, including works of fiction, which contain or purport to contain any Sensitive Compartmented Information or description of activities that produce or relate to Sensitive Compartmented Information or that I have reason to believe are derived from Sensitive Compartmented Information, that I contemplate disclosing to any person not authorized to have access to Sensitive Compartmented Information or that I have prepared for public disclosure.

DD 1847-1 ¶ 4.

Since the plaintiffs' initial assault on these provisions, some changes have been made to the forms. In response to complaints that "classifiable" is unconstitutionally vague and overbroad, the ISOO made several attempts to refine the definition. The most recent definition declares:

> As used in paragraph 1 of SF 189, the term "classifiable information: refers to two categories of information only: (a) Unmarked *classified* information, including oral communications; and (b) *unclassified* information that meets the standards for classification and is in the process of a classification determination.

52 Fed. Reg. 48,367 (Dec. 21, 1987) (emphasis in original) (amending 32 C.F.R. § 2003.20(h)(1)(i)).[3] Shortly after this supposed improvement, the implementation and enforcement of the forms were suspended entirely in response to section 630 of the Omnibus Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202 (Dec. 21, 1987).[4] Most recently, the ISOO announced its intention

[3] This redefinition of "classifiable" applies only to the SF 189. Neither the DCI nor the DOD has adopted this definition of the term, and examination of the SF 4193 and DD 1847-1, therefore, must proceed as though the term had received no regulatory elaboration.

[4] In its May 27 memorandum and order, the Court struck down section 630 as an unconstitutional intrusion by the Congress upon the

to supersede SF 189 with an agreement that omits the phrases "classifiable" and "indirect unauthorized disclosure." [5] Letter from Steven Garfinkel to Representative Jack Brooks (June 16, 1988) (filed July 1, 1988).

The SF 4193 has undergone a less dramatic evolution. On March 18, 1988, the form was replaced with SF 4355 which eliminates reference to "classifiable" information. The prepublication review requirement and the phrase "indirect unauthorized disclosure" remain in the form. Neither the DCI nor the DOD has suggested that the form will undergo further modification.

Although these changes redound to the benefit of future signatories to the nondisclosure agreements, plaintiffs continue to assert their constitutional and statutory claims for those employees who signed the forms as they were originally drafted. Of course, plaintiffs continue to assert these claims as to the remaining portions of the amended forms that they consider offensive.

II. DISCUSSION

Of the four theories with which plaintiffs attack the nondisclosure agreements, the two that are premised on constitutional rights demand careful scrutiny by the Court. Additionally, these theories supersede plaintiffs' claim under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), because any violation of a constitutional right is necessarily "contrary to law." Because the

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power of the Executive to conduct this nation's foreign affairs. Mem. op. at 25-30.

[5] Although these proposed changes accommodate many of plaintiffs' concerns regarding the SF 189, the changes may not be considered by the Court in evaluating the lawfulness of the form. The changes have not been implemented, and any remedial effect of the changes on previously executed agreements is purely speculative.

premises of the APA claim are the alleged violations of the First and Fifth Amendment, resolution of the constitutional issues will be dispositive of the APA claim. Additionally, the relief appropriate, if plaintiffs prevail on their constitutional claims, would be the same under the APA. Finally, whether the nondisclosure agreements violate the statutorily guaranteed right of federal employees to communicate with Congress is a question the Court need not address. None of the plaintiffs claims that any obligation created by the agreements has been invoked to bar their communication with Congress.

A. The Constitutional Principles Applicable To The Nondisclosure Agreements

At the heart of this case is a constitutionally inherent conflict between the obligation of the Executive to safeguard national security information and the rights of citizens to speak freely and be guided by reasonably clear and narrow statutory proscriptions on the free speech right. Reconciliation of these competing interests is made more difficult in this case by the dual role of plaintiffs as citizens and members of the Executive Branch. *See United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 564 (1973). Executive employees unquestionably have an obligation to preserve the secrecy of national security information, *see Department of Navy v. Egan,* 108 S. Ct. 818, 824 (1988) (security clearance premised on trustworthiness of employee to protect sensitive information); *Snepp v. United States,* 444 U.S. 507, 510-11 & n.6 (1980) (per curiam) (employee with access to "secret" information enters special trust relationship with government); 5 U.S.C. § 7532 (Executive employee may be suspended if "necessary or advisable in the interests of national security"), and the President has

broad discretion to ensure that his employees are faithful to this obligation. *See Egan,* 108 S. Ct. at 824-25; *CIA v. Sims,* 471 U.S. 159, 170 (1985); *Cole v. Young,* 351 U.S. 536, 546 (1956) (summary suspension of employee in "sensitive" position justifiable); *U.S. v. Curtiss-Wright Corp.,* 299 U.S. 304, 320 (1936) (secrecy "may be highly necessary" and "premature disclosure . . . productive of harmful results"); 50 U.S.C. § 403(d)(3) (CIA entrusted to protect intelligence sources and methods). Supplementing this discretion are the government's

> interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.

Pickering v. Board of Education, 391 U.S. 563, 569 (1968).

Countervailing the substantial authority of the President in his national security domain are constitutional principles that preclude him from conditioning federal employment upon reliquishment of a constitutional right. *See Perry v. Sinderman,* 408 U.S. 593, 597 (1972). While no applicant for federal employment may demand a security clearance, *Egan,* 108 S. Ct. at 824, the Executive may not condition such clearance, which may be a prerequisite to employment, on execution of an agreement that unconstitutionally restricts the applicant's speech.

> The problem in any case is to arrive at a balance between the interests of the [employee], a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering, 391 U.S. at 568. The weight of these interests is measured by complementary constitutional principles that

incorporate First and Fifth Amendment values. *See McGehee v. Casey,* 718 F.2d 1137, 1142-43 (D.C. Cir. 1983). Because censorship is inimical to free speech, the first of these principles requires that any "restriction[ ] on the speech of government employees must 'protect a substantial government interest unrelated to the suppression of free speech.' " *Id.* (quoting *Brown v. Glines,* 444 U.S. 348, 354 (1980) and citing *Snepp,* 444 U.S. at 509 n.3). The repugnance of overbroad and vague restrictions on free speech is embodied in the second principle which demands that any "restriction must be narrowly drawn to 'restrict speech no more than is necessary to protect the substantial government interest.' " *Id.* (quoting *Brown,* 444 U.S. at 355 and citing *National Association of Letter Carriers,* 413 U.S. at 580).

At issue in *Brown* were Air Force regulations that prohibited the solicitation of signatures on a petition within the confines of an Air Force base except by permission of the commanding officer. A related regulation barred the distribution of printed material without such permission. 444 U.S. at 349-50. In sustaining the regulations, the Supreme Court explained that First Amendment protections may be tempered by governmental interests:

> " 'Speech that is protected in the civil population may . . . undermine the effectiveness of response to command.' " *Parker v. Levy,* [417 U.S. 733, 759 (1974)], quoting *United States v. Priest,* 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972). Thus, while members of the military services are entitled to the protections of the First Amendment, "the different character of the military community and of the military mission requires a different application of those protections." *Parker v. Levy,* 417 U.S., at 758. The rights of military men must yield somewhat " 'to meet certain overriding demands of discipline and duty. . . .' " *Id.*, at

> 744, quoting *Burns v. Wilson,* 346 U.S. 137, 140 (1953) (plurality opinion). Speech likely to interfere with these vital prerequisites for military effectiveness therefore can be excluded from a military base. [*Greer v. Spock,* 424 U.S. 828, 840 (1976)]. . . .

444 U.S. at 354-55 (footnote omitted). The *Brown* Court concluded that the Air Force regulations violated by Glines were "reasonably necessary to protect the substantial governmental interest . . . and prevent[ed] commanders from interfering with the circulation of any materials other than those posing a clear danger to military loyalty, discipline, or morale." *Id.* at 355.

While the nondisclosure agreements are intended to preserve the secrecy of classified information, not to maintain military discipline, the broader governmental interest served by these two purposes is nearly identical—the preservation of national security. Thus, while all governmental employees enjoy First Amendment rights, *Perry,* 408 U.S. at 597; *see Branti v. Finkel,* 445 U.S. 507, 514 (1980), those with access to classified information must accept a different application of free speech protections. Because the government's interest in safeguarding national security information is undeniably substantial and unrelated to the suppression of free speech, the Court focuses upon whether the challenged portions of the nondisclosure agreements are sufficiently precise to restrict no more speech than is necessary to serve the government's interest.[6] Any portion of the agreements that is vague or

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[6] There is no dispute that the government has no interest in censoring unclassified information. Defendants state repeatedly that the agreements by their language encompass only classified information. Because the agreements define classified information to include "classifiable" information, the defendants' statement begs a central question in this case.

overbroad necessarily fails this test. *See Cole v. Richardson,* 405 U.S. 676, 680-81 (1972).

B. The Constitutionality Of The Prepublication Review Requirement Has Been Established

In *Snepp v. United States,* 444 U.S. 507 (1980) (per curiam), the United States sought to enforce an agreement, signed by Snepp upon his entry into the CIA, in which Snepp promised "not to publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency." *Id.* at 508. Affirming the lower courts' enforcement of the agreement, the Court rejected Snepp's claim that the agreement embodied an unconstitutional prior restraint:

> We agree with the Court of Appeals that Snepp's agreement is an "entirely appropriate" exercise of the CIA Director's statutory mandate to "protec[t] intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 403(d)(3). 595 F.2d, at 932. Moreover, *this Court's cases make clear that—even in the absence of an express agreement—the CIA could have acted to protect government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment.* . . . The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service. . . . The agreement that Snepp signed is a reasonable means for protecting this vital interest.

Id. at 509 n.3 (emphasis added). This unequivocal state-

ment by the Supreme Court leaves no doubt that a prepublication requirement imposed upon government employees with access to classified information is entirely constitutional. That the agreement in *Snepp* covered only "secret" information and was executed only by CIA employees does not change the gravity of the government's interest in assuring the secrecy of national security information, nor do these distinctions render the agreements a less reasonable means for protecting that interest. Indeed, because the SF 4193, SF 4355, and DD 1847-1 require prepublication review only of documents relating to SCI, these agreements are more narrowly proscriptive of speech that [*sic*] the agreement in *Snepp*.

C. "Classifiable" Information

All the nondisclosure agreements involved in this case prohibit the unauthorized disclosure of classified information. As originally drafted, the SF 189, SF 4193, and DD 1847-1 defined classified information as information that is "classified or classifiable." In response to objections regarding the meaning of "classifiable," the ISOO elaborated several times upon the term as used in the SF 189. *See, e.g.*, 52 Fed. Reg. 48,367 (Dec. 21, 1987); 52 Fed. Reg. 29,793 (Aug. 11, 1987). Although the DCI never adopted these regulatory definitions of the term, it has superseded SF 4193 with a form that omits reference to "classifiable" information. No revisions of the DD 1847-1 have been brought to the Court's attention.

Regardless of regulatory definitions or revisions, the original versions of the forms were executed by many federal employees. Plaintiffs complain that because the ISOO's definition has not been distributed to each of the signatories to the SF 189, the agreement must be evaluated as though no such definition had taken place. Their rea-

soning is that the unconstitutional chill on First Amendment rights is threatened by the language of the agreement known to the signatory. Any definition given to "classifiable" beyond the four corners of the agreement has no bearing on the constitutional question because signatories to the agreement have not been notified of the definition.[7]

In addition to challenging "classifiable" as originally used in the agreements, plaintiffs contend that the ISOO's redefinition does not fully comport with constitutional requirements. They complain particularly that the latest definition impermissibly extends the scope of the SF 189 beyond information that the employee knows to be classified. Applying the agreement to information that the employee reasonably should have known to be classified requires the employee to make his own classification determination, and Executive Order 12,356 expressly restricts this power to a small group of designated officials. *See* Exec. Order 12,356 § 1.2. Further, plaintiffs object to imposition of liability for negligent disclosure of information.

1. ***"Classifiable" On Its Face Is Insufficiently Narrow To Survive Constitutional Scrutiny***

Although restraints on the free speech of federal employees has been condoned by the Supreme Court, the mechanism of restraint must be carefully tailored. *See Brown,* 444 U.S. at 355. Applying the nondisclosure agreements to "classifiable" information is permissible

[7] Constitutional scrutiny of the SF 4193 is unaffected by the ISOO's several redefinitions of "classifiable" because the DCI has not adopted them. Similarly, differences between the SF 4193 and SF 4355 are irrelevant because the omission of "classifiable" from the latter does not apply to the former. Thus, the Court must examine the term as redefined by the ISOO for the SF 189 and as used without elaboration by the DCI in the SF 4193.

only if the term is defined narrowly to include no more information than is necessary to further the government's need for secrecy. *See McGehee,* 718 F.2d at 1143 (citing *Brown*). As originally used in the SF 189, SF 4193, and DD 1847-1, "classifiable" benefitted from no clarifying definition. Employees who executed the forms were left to assign their own meaning to the term.

On its face, "classifiable" has no readily discernible meaning. Indeed, prior to his promulgation of definitions in the Code of Federal Regulations, the Director of the ISOO apparently admitted that "arguably it could mean anything." Letter from Representative Gerry Sikorski to Frank Carlucci 2 (June 24, 1987) (quoting ISOO Director Steven Garfinkel). At its broadest, the term applies to any information that would be classified if examined by a classification authority. Within this broad definition is information that does not become classified until its disclosure piques the concerns of the Executive. Also included is information that becomes classified in the future though only speculation would have suggested that such classification would occur.

From this extreme end of the spectrum of definitions, numerous successively narrower definitions could be given. Any one of these definitions might reasonably have been adopted by federal employees executing the SF 189, SF 4193, or DD 1847-1. Given this array of definitions, the Court cannot conclude that applying the obligations of the nondisclosure agreements to "classifiable" information is a mechanism that "restrict[s] speech no more than is necessary to protect the substantial government interest." *Brown,* 444 U.S. at 355.

2. *"Classifiable" As Definied For The SF 189*

Before these lawsuits were filed, plaintiffs made known to the ISOO their concerns regarding the language of the

nondisclosure agreements. A regulatory definition of "classifiable" and a refinement of that definition were promulgated, purporting to address some of these concerns. The most recent of these states:

> (i) . . . [T]he term "classifiable information" refers to two categories of information only: (a) Unmarked *classified* information, including oral communications; and (b) *unclassified* information that meets the standards for classification and is in the process of a classification determination. "Classifiable information" does *not* refer to currently unclassified information that may be subject to possible classification at some future date, but is not currently in the process of a classification determination. Therefore, the only circumstances under which a party to SF 189 might violate its terms by disclosing *unclassified* information are when a party knows, or reasonably should know, that such information is in the process of a classification determination and requires interim protection. . . .
>
> (ii) A party to SF 189 may be liable for disclosing "classifiable information" only if: (a) He or she knows that the unmarked information is classified, or meets the standards for classification and is in the process of a classification determination, whether the unauthorized disclosure is willful or negligent; or (b) he or she should know that the unmarked information is classified, or meets the standards for classification and is in the process of a classification determination, in which case the unauthorized disclosure is negligent. In no instance could a party to SF 189 be liable for violating its nondisclosure provisions by disclosing unmarked information when, at the time of the disclosure, there was no basis to suggest, other

> than pure speculation, that the information was classified or in the process a classification determination.

52 Fed. Reg. 48,367 (Dec. 21, 1987) (emphasis in original) (amending 32 C.F.R. § 2003.20(h)(1)). Unlike "classifiable" on its face, this regulatory definition of the term certainly would guide SF 189 signatories in fulfilling their obligations under the agreement. Plaintiffs complain, however, that liability for negligent disclosure or for disclosure of information the employee should reasonably know to be classified is not a narrowly drawn means for protecting the government's substantial interest in protecting national security. They insist that liability must be based on scienter or intent.

Were plaintiffs correct, the government would be empowered to punish with civil sanctions only intentional disclosures of information the employee know to be classified or knew to be in the process of a classification determination and to meet the standards for classification. By necessity, however, much classified information is not marked as such because it has not been examined by a classification authority. The government nevertheless has a substantial interest in safeguarding that information. Plaintiffs' suggested construction of "classifiable" draws too narrowly the bounds of the nondisclosure agreements.

The definition offered by the ISOO simply requires that employees consider whether they have reason to believe that unmarked information is classified or should be classified and is in the process of becoming so. The reasonable person standard is one to which people are held in all their activities, and it does not become unconstitutionally vague simply because First Amendment rights are involved. Indeed, it is as precise as possible given the vast array of information possessed by the government. Thus, the ISOO's regulatory definition of "classifiable" information does not violate constitutional norms.

The value of this constitutionally permissible definition is limited, unfortunately, because it is unlikely that those employees who have signed the SF 189 have been informed of the definition. Until an employee becomes aware of the regulatory definition, he cannot know that "classifiable" information does not include, for example, information that only speculation suggests will become classified. So long as signatories to the SF 189 are unaware of the ISOO definition of "classifiable," constitutional norms do not allow them to be liable for any disclosure of such information. Notice of the definition is essential.

The obvious remedy for this lack of notice is distribution of the regulatory definition of "classifiable" that appears in 32 C.F.R. § 2003.20(h)(1). The ISOO, DCI, and DOD may choose whatever mechanism for distribution they deem most efficient; the mechanism simply must deliver as soon as practicable a copy of section 2003.20(h)(1) to every employee who has or will sign a nondisclosure agreement using the word "classifiable." Until such distribution occurs, the agreements may not be enforced to penalize disclosure of "classifiable" information. Alternatively, these agencies may choose to distribute a notice that deletes "classifiable" from the agreements and states that no employee shall be liable for disclosure of "classifiable" information.

D. "Indirect Unauthorized Disclosure"

Plaintiffs' final constitutional objection to the nondisclosure agreements regards the admonition that "indirect unauthorized disclosure" of classified information or SCI "could cause irreparable injury to the United States or be used to advantage by a foreign nation." SF 189 ¶ 3; SF 4193 ¶ 3; DD 1847-1 ¶ 3. Following this warning, the agreements elicit a promise from the employee not to

"divulge such information to anyone who is not authorized to receive it without prior written authorization." *Id.* Repeating their First and Fifth Amendment arguments, plaintiffs insist that the term is broader than necessary to protect the government's substantial interest in the secrecy of classified information.

At first glance, plaintiffs' argument is sensible because a promise not to divulge indirectly any classified (or classifiable) information imposes absolute liability upon the employee for any unauthorized disclosure. Closer scrutiny, however, reveals that while it may be unfair to hold an employee absolutely liable, First Amendment rights are not implicated. The freedom of federal employees to speak freely is impaired by limitations on the content of their speech. Thus, an overly broad definition of "classifiable" is constitutionally unacceptable. However, if federal employees have no constitutional right to disclose certain information, they cannot complain that disclosure is absolutely prohibited. Accordingly, no constitutional concerns are raised by the use of the term "indirect unauthorized disclosure."

E. Plaintiffs Fail To State A Claim Under 5 U.S.C. § 7211

Wholly part from their constitutional claims, plaintiffs in *AFGE* insist that the nondisclosure agreements violate their statutory right as federal employees to communicate with Congress. The right has been assured for many years, and in its most recent incarnation, the relevant statute provides:

> The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

5 U.S.C. § 7211. Plaintiffs argue that the nondisclosure agreements interfere with the right guaranteed by this statute.

In order to state a claim for relief under this statute, plaintiffs must at least allege that they have disclosed or intend to disclose some classified or classifiable information to Congress and have been threatened with enforcement of the nondisclosure agreements. No such allegation appears in the complaint. Apparently, the *AFGE* plaintiffs hope to rely upon the unusually liberal construction accorded claims under the First Amendment. This liberality allows the chilling effect of anticipated governmental action to form the basis for a claim under the First Amendment. *See Laird v. Tatum,* 408 U.S. 1, 11 (1972); *National Federation of Federal Employees v. United States,* Civil Action No. 87-2284, mem. op. at 23-24 (D.D.C. May 27, 1988). There is no justification, however, for so liberally construing the statutory claim asserted by plaintiffs. Because plaintiffs in *AFGE* fail to state an essential element of their claim in count V, summary judgment for defendants is proper. *See District of Columbia v. Air Florida, Inc.,* 750 F.2d 1077, 1078 (D.C. Cir. 1984).

III. CONCLUSION

In order to add civil sanctions to its arsenal of weapons protecting national security information, the government requires its employees with access to classified information to sign a nondisclosure agreement. Plaintiffs challenge three aspects of the forms as unconstitutional or contrary to statute. Regarding plaintiffs' resistance to the prepublication review requirement in the SF 4193 and DD 1847-1, the Supreme Court has already determined that such a requirement is consistent with the First Amendment rights of federal employees.

A novel issue is raised, however, regarding use of the term "classifiable" to describe information the disclosure of which is prohibited by the agreements. In the absence of any definition, the term is far too broad to comport with the constitutional requirement that restraints on free speech be narrowly drawn to bar no more speech than is necessary. Because no such definition has been offered with respect to the SF 4193 and DD 1847-1, use of the term in those forms is unconstitutional. While the definition promulgated by the ISOO is appropriately narrow, it has never been published to signatories of the SF 189. The constitutional infirmity in all the forms may be remedied by distribution of the ISOO's definition of "classifiable" to any federal employee who has signed or will sign an agreement incorporating that term. Until these federal employees are informed of the refined definition of classifiable, the agreements may not be enforced for disclosures of classifiable information. Alternatively, a notice may be distributed stating that "classifiable" is retroactively deleted from all agreements.

Plaintiffs' final constitutional claim concerns the proscription in the agreements against "indirect unauthorized disclosure" of classified (or classifiable) information. Though successful regarding the term "classifiable," First and Fifth Amendment arguments have no force when applied to the phrase "indirect unauthorized disclosure." At its broadest, the phrase imposes absolute liability on an employee who may be linked to the disclosure of classified (or classifiable) information. Although this may be unfair, it has no First or Fifth Amendment implications. If an employee has no right to disclose certain information, he cannot complain that the government entirely prohibits such disclosure.

Finally, the Court grants summary judgment for defendants on the claim in *AFGE* that the agreements violate

5 U.S.C. § 7211. While plaintiffs certainly have a statutory right to communicate with Congress, they fail to allege that the right has been violated. At most, they anticipate such a violation, but such an allegation is insufficient to state a claim under this statute.

/s/ OLIVER GASCH
United States District Judge
Oliver Gasch

Date: July 28th, 1988

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Supreme Court, U.S.
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OCT 17 1988
SPANIOL, JR.
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No. 87-2127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION, *et al.*,
Appellants,

v.

STEVEN GARFINKEL, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPPOSITION TO MOTION TO AFFIRM

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TABLE OF AUTHORITIES

Cases: Page

Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973) 6

Morrison v. Olson, ____U.S.____, 108 S. Ct. 2597 (1988) 6

National Federation of Federal Employees v. United States, No. 87-2284-0G, (D.D.C. July 29, 1988) 4, 5

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 6

United States v. Generix Drug Corp., 460 U.S. 453 (1983) 5

United States v. Munsingwear, 340 U.S. 36 (1950) 2

United States v. W.T. Grant Co., 345 U.S. 629 (1953) 5

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 7

Constitution and Statutes:

Article I, § 8 7

Civil Service Reform Act, 5 U.S.C. § 2302(b) 6

5 U.S.C. § 7211 6

Pub. L. No. 100-202, § 630, 1988 U.S. Code Cong. & Ad. News (101) Stat. 1329 (Dec. 22, 1987) ..... *passim*

Page

Treasury, Postal Service and General Appropriations Act of 1989, Pub. L. No. 100-440, § 619, 102 Stat. 1721 (Sept. 22, 1988) 2

Other Authorities:

53 Fed. Reg. 38,279 (Sept. 29, 1988) (32 C.F.R. § 2003.20(h)(3)) 3

Classified Information Nondisclosure Agreements: Hearing before the Subcommittee on Human Resources, House Committee on Post Office and Civil Service, 100th Cong., 1st Sess. (Serial No. 100-37, Oct. 15, 1987)..... 4

General Accounting Office Testimony, *Congress and the Administration's Secrecy Pledges: Hearing Before Legislation and National Security Subcommittee, House Government Operations Committee,* 100th Cong., 2d Sess. (Aug. 10, 1988) 3

24 Weekly Comp. Pres. Docs. 1189 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-2127

AMERICAN FOREIGN SERVICE ASSOCIATION, *et al.*,
Appellants,

v.

STEVEN GARFINKEL, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OPPOSITION TO MOTION TO AFFIRM

Nowhere in their motion to affirm do appellees even attempt to show, as required to obtain summary affirmance under Rule 16.1(c) of this Court, that "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." On the contrary, the very length and complexity of their motion underscore the novelty and importance of the issues raised in this case and the necessity for plenary review of the district court's broad holding of unconstitutionality. Thus, although the district court decided this case by declaring that Section 630 was unconstitutional in every conceivable application, appellees seek affirmance based on recent developments, which they claim render challenges to their noncompliance with certain parts of Section 630 moot, and on several arguments that were never presented to, let alone adopted by, the district court.

We first address appellees' claim that the challenges to the portions of Section 630 that limit the type of information that may be covered by nondisclosure agreements are moot, and then we respond to appellees' contention that Section 630's other provisions, which limit the extent to which nondisclosure agreements may impose obligations that are inconsistent with statutes and may prohibit employees from providing information to Congress, are so blatantly unconstitutional in all of their applications that this Court should summarily affirm the district court's declaration of facial unconstitutionality.[1]

1. Appellees do not contend that the district court was correct in holding unconstitutional Section 630's prohibition on the use of the term "classifiable" and its other restrictions in subsection 1 on the information that may be covered by nondisclosure agreements. Rather, they assert that this controversy is now moot, because, after convincing the district court to invalidate Section 630, and being ordered in the companion cases to delete or narrowly define "classifiable," they deleted the term "classifiable" from future nondisclosure agreements and took other actions, which they claim meet the principal concerns embodied in subsection 1. Motion at 14-15, 18-19; Appellants' App. D and E, attached as Appendices to this Opposition. Not only do appellees' actions fall far short of full compliance with Section 630, but, even if they had complied, the district court's judgment should be vacated as moot, not summarily affirmed. *United States v. Munsingwear*, 340 U.S. 36 (1950).

Despite appellees' assertions to the contrary, they have not complied with the first two provisions of Section 630 in two

[1]Section 619 of the Treasury, Postal Service and General Appropriations Act of 1989, Pub. L. No. 100-440, 102 Stat. 1721, which the President signed on September 22, 1988, is identical to Section 630 and continues its terms through Fiscal Year 1989. For convenience, we refer to them collectively as Section 630.

respects. First, although the new nondisclosure agreements — SF 312 and 4355 — omit the term "classifiable," the 49,000 SF 189 and SF 4193 agreements signed during Fiscal Year 1988, as well as the forms signed before the Section 630 ban, retain that term. *See* General Accounting Office Testimony, *Congress and the Administration's Secrecy Pledges: Hearing Before Legislation and National Security Subcommittee, House Government Operations Committee*, at 5-6, 100th Cong., 2d Sess. (Aug. 10, 1988). Even compliance with the district court's orders in the companion cases would not render the challenge under subsection 2 moot, because those orders allow the continued use of the term "classifiable," provided that it is narrowly defined. Appellants' App. D and E. Moreover, appellees do not plan to give notice of even those changes to former employees who remain bound by the agreements after they leave government service. In addition, appellees have never promised that they will not seek sanctions for disclosures of "classifiable" information made by appellants and others prior to the deletion of that term from the forms, which, of course, would violate Section 630's enforcement ban.

Second, neither appellees' clarification of the information covered by SF 189, nor the newly issued SF 312 or SF 4355 agreements, comply with subsection 1 of Section 630, which limits nondisclosure agreements to information that is "specifically marked as classified" or "unmarked but known by the employee to be [either] classified" or "in the process of a classification determination." Both appellees' clarification and the new forms go beyond subsection 1 to cover unmarked information that the individual "reasonably should know" is classified or in the process of a classification determination. 53 Fed. Reg. 38,279 (Sept. 29, 1988) (32 C.F.R. § 2003.-20(h)(3)).

Appellees do not claim that they have complied with subsection 1's actual notice requirement, but only that they have met

Congress' "principal concerns" and that their forms are in "harmony" with subsections 1 and 2. Motion at 19-21. However, Congress's principal concern was to ensure that employees will be bound by the pervasive obligations in the nondisclosure agreements (including liability for negligent and reckless handling of classified information) only where they have actual notice that the terms apply. As appellant Senator Charles Grassley put it: "How does one know when information is classified? The answer is that it is marked 'classified.' How does one know something is classifiable? The answer is that one cannot know." *Classified Information Nondisclosure Agreements: Hearing before the Subcommittee on Human Resources, House Committee on Post Office and Civil Service,* at 9, 100th Cong., 1st Sess. (Serial No. 100-37, Oct. 15, 1987). In order to ensure that employees would not be forced to speculate as to whether particular information is covered by a nondisclosure agreement, Congress limited the agreements to information that the employee actually knows is covered. However, because appellees' definition binds employees to the more expansive "reasonably should have known" standard barred by subsection 1, this issue is plainly not moot.[2]

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[2]Appellees also argue that subsection 1's actual notice requirement does not define what information may be covered by a nondisclosure agreement, but rather merely establishes the standard of care for violations of the nondisclosure agreements' obligations. Motion at 20-21. Not only does this argument run counter to Congress' plain intent, but it also was not raised below and hence cannot be the basis for summary affirmance.

In the companion cases, the district court likewise recognized the distinction between actual notice and a "reasonably should have known" standard. Thus, after holding that the term "classifiable" is "far too broad to comport with the constitutional requirement that restraints on free speech be narrowly drawn to bar no more speech than is necessary," the district court concluded actual notice is not necessary to remove the First Amendment flaw, but rather imputed knowledge may suffice. *Na-*

Even if appellees had in fact fully complied with subsections 1 and 2 of Section 630, it would not be proper for this Court to summarily affirm the district court decision or even to vacate the lower court opinion as moot because appellees have made it absolutely clear that they do not feel bound to comply with Section 630 because they believe it is unconstitutional. Indeed, as appellees concede, "the President directed that . . . Section 619 will be considered to be of no force and effect unless and until this Court reverses the ruling of the district court in the instant case holding the identical provisions in Section 630 of the 1988 Act unconstitutional." Motion at 14, *citing* 24 Weekly Comp. Pres. Docs. 1189. Therefore, since appellees remain entirely free to return to their old ways and seem likely to do so, this case should not be dismissed on mootness grounds, even as to those portions of Section 630 with which appellees are now complying. *United States v. Generix Drug Corp.*, 460 U.S. 453, 456-57 n.6 (1983); *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953).

2. Appellees never contend that they are complying with subsections 3 and 4, the provisions concerning disclosures to Congress, or subsection 5, which forbids the President from imposing obligations through nondisclosure agreements that are inconsistent with other statutes. Therefore, with respect to these provisions, as well as subsection 1's actual notice requirement, this case is not moot.

To the extent that appellees seek to defend the district court judgment, rather than argue that the case is moot, they do so primarily on the grounds other than the one on which the

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tional Federation of Federal Employees v. United States, No. 87-2284-OG, slip op. at 14-18, 21 (July 29, 1988); Appellees' App. B, at 16a-19a, 23a. Even if the First Amendment requires only what the district court ordered, Congress is not limited to that standard in legislation, such as Section 630.

district court relied. Thus, appellees contend that the district court could have declined to issue equitable relief in its discretion, without finding Section 630 unconstitutional, Motion at 28-29, and that appellants have no standing to vindicate the rights of Congress protected by subsection 4. *Id.* at 23 n.22. Similarly, appellees claim that the whistleblower protections of the Civil Service Reform Act, 5 U.S.C. § 2302(b), constitute the sole statute undermined by the nondisclosure agreements, Motion at 23 n. 22, thereby ignoring other statutes, such as 5 U.S.C. § 7211, which protects federal employees' rights to petition and furnish information to Congress and its members, and which also impose limitations on the terms of nondisclosure agreements through Section 630. While we do not suggest that appellees may not raise such arguments in seeking to defend the district court's dismissal of the complaint, they are not the ones adopted by the district court below, and do not support summary affirmance.

3. Appellees defend the separation of powers ruling of the district court only with respect to subsection 1's actual notice requirement and subsection 3, which protects employees' disclosures to Members of Congress. Motion at 21-27. In defending these aspects of the district court's decision, appellees assume that Section 630 is unconstitutional on its face simply because it may have some applications that are unconstitutional. But that approach stands on its head the presumption of constitutionality that attaches to laws duly passed by the Congress and signed by the President. *Morrison v. Olson*, ____ U.S. ____, 108 S. Ct. 2597, 2614 (1988); *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 571 (1973). Thus, even if some application of a law may violate separation of powers principles, a point that we do not concede with respect to Section 630, that does not make the entire law unconstitutional. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

Similarly, appellees focus exclusively on the President's role in protecting national security information to support the decision below, but make no mention of Congress' substantial need for access to national security information in carrying out its constitutionally assigned functions under Article I, § 8, let alone of the proper balance between the competing needs and roles of the Executive and Legislative Branches in this area. Also wholly missing from appellees' motion is any discussion of Congress's role as the repository of legislative power and of the effect of legislative action, such as Section 630, on the President's authority to act under the standards set forth in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Most importantly, at no place do appellees dispute that the ruling of the district court striking down Section 630 as unconstitutional on its face raises substantial issues concerning the role that Congress may constitutionally play in regulating the disclosure of national security information in a whole array of other statutes in addition to Section 630. Indeed, the lower court decision marks the first occasion in which a court has declared a duly enacted statute unconstitutional on the basis of the Executive Branch's inherent power in the national security area. It also marks the first decision declaring that Congress has *no* authority to enact legislation that regulates the President's power to limit the disclosure of national security information. Thus, it is not surprising that, despite the length and breadth of their motion, appellees, like the district court, cited no cases that previously addressed these novel issues, let alone that control their outcome. In light of the significant new ground broken by the lower court's decision, the Court should deny appellees' motion to affirm.

CONCLUSION

For the foregoing reasons, this Court should deny appellees' motion to affirm and note probable jurisdiction.

Respectfully submitted,

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October 17, 1988

Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,	)	
Plaintiff,	)	Civil Action
v.	)	No. 87-2284-OG
	)	
	)	**FILED**
UNITED STATES OF AMERICA, *et al.*,	)	**JUL 29, 1988**
	)	**Clerk,**
Defendants.	)	**U.S. District Court District of Columbia**
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,	)	
	)	Civil Action
Plaintiffs,	)	No. 87-2412-OG
v.	)	
	)	
STEVEN GARFINKEL, *et al.*,	)	
Defendants.	)	

FINAL JUDGMENT AND ORDER

Upon consideration of defendants' Motion to Dismiss and plaintiffs' Motions for Summary Judgment, the oppositions thereto, and the record herein, and for the reasons stated in the accompanying memorandum, it is by the Court this *28th* day of July, 1988

ORDERED that defendants' Motion to Dismiss be, and hereby is, granted as to counts V and VII in Civil Action No. 87-2412 and denied as to the remaining counts; and it is further

ORDERED that plaintiffs' Motions for Summary Judgment be, and hereby are, granted, in part, as to count II in Civil Action No. 87-2284 and as to counts I and II in Civil Action

No. 872412, and denied as to all remaining counts; and it is further

ADJUDGED AND DETERMINED that use of the term "classifiable" in SF 189, SF 4193, DD 1847-1, or any other nondisclosure agreement is unconstitutional unless the form includes or is accompanied by the definition of "classifiable" that appears in 32 C.F.R. § 2003.20(h)(1); and it is further

ADJUDGED AND DETERMINED that an agreement includes or is accompanied by the definition of "classifiable" that appears in 32 C.F.R. § 2003.20(h)(1) if this section of the C.F.R. is reprinted and:

(1) Presented to the employee at the time the agreement is executed; or

(2) Delivered within sixty (60) days of the date of this Order to the employee who has already signed the agreement; and it is further

ORDERED that until the employee receives a copy of the definition of "classifiable," the nondisclosure agreement may not be enforced to penalize the employee for disclosure of "classifiable" information; and it is further

ORDERED that in lieu of delivery or presentment of the definition of "classifiable," the Information Security Oversight Office, the Director of Central Intelligence, the Department of Defense, and any other agency that has used a nondisclosure agreement containing the word "classifiable" may notify every employee that has signed such an agreement that "classifiable" is stricken from the agreement and that liability shall not arise under the agreement for disclosure of "classifiable" information; and it is further

ORDERED that within sixty (60) days of the date of this Order each employee that has signed a nondisclosure agreement containing the word "classifiable" shall receive a copy of the definition of "classifiable" that appears in 32 C.F.R. § 2003.20(h)(1) or notice that the word is stricken from the agreement and shall not be a basis for liability.

/s/ **Oliver Gasch**

United States District Judge
Oliver Gasch

Appendix E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, *Plaintiff,*	)	Civil Action No. 87-2284-OG
v.	)	
UNITED STATES OF AMERICA, *et al.*, *Defendants.*	)	**FILED SEP 26, 1988 Clerk, U.S. District Court District of Columbia**
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*, *Plaintiffs,*	)	Civil Action No. 87-2412OG
v.	)	
STEVEN GARFINKEL, *et al.*, *Defendants.*	)	

ORDER

Upon consideration of the defendants' motion to alter or amend judgment, the oppositions thereto, and the record herein, and it appearing from the representations of government counsel in open court that the word "classifiable" has been deleted in some instances and other words substituted therefor; and it further appearing that to the extent that "classifiable" is still deemed binding on certain government employees, that those who are deemed bound by the non-disclosure agreement be given actual notice as hereinafter provided, it is by the Court this *25th* day of September, 1988,

ORDERED, that defendants' motion be, and hereby is, granted in part and denied in part; and it is further

ORDERED that the defendants are granted an additional thirty (30) days within which to comply with this Court's Order of July 29, 1988, so that within ninety (90) days of the date of the Court's original Order, each employee who has signed a nondisclosure agreement containing the word "classifiable" shall either receive a copy of the definition of "classifiable" as the same appears in 32 C.F.R. § 2003.20(h)(1) or notice that the word has been stricken from the agreement and what, if any, words have been substituted in lieu thereof.

/s/ **Oliver Gasch**

Judge

Supreme Court, U.S.
FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION, *et al.*,
Appellants,

v.

STEVEN GARFINKEL, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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THE COURT NOTED PROBABLE JURISDICTION ON OCTOBER 31, 1988.

TABLE

Docket Entries 1

Complaint filed February 19, 1988 5

Plaintiffs' Exhibit 2 — National Security Decision Directive 84 (March 11, 1983). 11

Plaintiffs' Exhibit 3 — Standard Form 189 15

Plaintiffs' Exhibit 5 — Standard Form 4193 19

Plaintiffs' Exhibit 6 — Declaration of Lt. General Edward J. Heinz (Feb. 9, 1988), in *National Federation of Federal Employees v. United States*, No. 87-2284-OG & *American Federation of Government Employees v. Garfinkel*, No. 87-2412-OG (D.D.C.). 26

Plaintiffs' Exhibit 7 — Affidavit of Steven Garfinkel (Feb. 8, 1988), in *National Federation of Federal Employees v. United States*, No. 87-2284-OG & *American Federation of Government Employees v. Garfinkel*, No. 87-2412-OG (D.D.C.). 28

Plaintiffs' Exhibit 8 — Information Security Oversight Office Letter of December 29, 1987. 30

Plaintiffs' Exhibit 9 — Information Security Oversight Office Letter of January 27, 1988. 32

Plaintiffs' Exhibit 10 — Affidavit of Representative Barbara Boxer (Nov. 17, 1987). 34

Plaintiffs' Exhibit 11 — Affidavit of Senator Charles E. Grassley (Nov. 18, 1987). 37

Defendants' Exhibit 4 — Declaration of William H. Webster, Director of Central Intelligence (Mar. 1, 1988). 40

Exhibit A in Support of the Declaration of William H. Webster —DCI Security Committee, Sensitive Compartmented Information: Characteristics and Security Requirements (June 1984). 45

Declaration of Lt. General Edward J. Heinz (Mar. 24, 1988). 52

Exhibit A in Support of Lt. General Heinz's Declaration — Standard Form 4355 54

Plaintiffs' Exhibit 16 — Letter to Chairman Jack Brooks from Colin L. Powell, National Security Council (Mar. 8, 1988). 59

Opinion and Order (May 27, 1988)(reproduced in appendix to jurisdictional statement). x

Notice of Appeal (June 3, 1988)(reproduced in appendix to jurisdictional statement). x

Final Judgment and Order, *National Federation of Federal Employees v. United States*, No. 87-2284-OG (D.D.C. July 29, 1988) & *American Federation of Government Employees v. Garfinkel*, No. 87-2412-OG (D.D.C.). 61

Order, *National Federation of Federal Employees v. United States*, No. 87-2284-OG (D.D.C. Sept. 26, 1988) & *American Federation of Government Employees v. Garfinkel*, No. 87-2412-OG (D.D.C.). 64

Standard Form 312 66

DOCKET ENTRIES

2/19/88	1	COMPLAINT filed summons issued (ew) [Entry date 2/22/88]
2/19/88	2	MOTION by plaintiff for preliminary injunction; Exhibits (15) (ew) [Entry date 2/22/88]
2/23/88	3	NOTICE OF FILING by plaintiffs Re: responses to interrogatories and request for production of documents submitted by defendants in the related cases CA 87-2284 and CA 87-2412 (gld) [Entry date 2/24/88]
2/26/88	4	ATTORNEY APPEARANCE for defendant GEORGE P. SHULTZ, defendant WILLIAM H. WEBSTER, defendant STEVEN GARFINKEL by David Anderson, Vincent M. Garvey, Neal Dittersdorf, William Robert Irvin (gld) [Entry date 2/29/88]
2/26/88	5	MOTION by defendant GEORGE P. SHULTZ, defendant WILLIAM H. WEBSTER, defendant STEVEN GARFINKEL to extend time to 3/2/88 to file opposition to plaintiffs motion for preliminary injunction (gld) [Entry date 2/29/88]
3/4/88	6	ORDER by Judge Oliver Gasch: granting motion by defendants to extend time to 3/2/88 to file opposition to plaintiffs motion for preliminary injunction [5-1] (signed 3/3/88) (N) (gld) [Entry date 3/8/88]
3/4/88	7	MOTION by GEORGE P. SHULTZ, defendant WILLIAM H. WEBSTER, defendant STEVEN

GARFINKEL for leave to file a reply brief and memorandum in support (gld) [Entry date 3/8/88]

3/4/88 8 AFFIDAVIT OF SERVICE of summons and complaint upon defendant GEORGE P. SHULTZ (unexecuted); upon defendant WILLIAM H. WEBSTER (unexecuted); upon defendant STEVEN GARFINKEL on 2/22/88; upon U.S. Attorney on 2/19/88; Attachments (gld) [Entry date 3/8/88]

3/8/88 — STATUS HEARING before Judge Oliver Gasch: oral motion by govt. to consolidate this action with CA 87-2284 and 87-2412 heard; hearing on motion for preliminary injunction [2-1] by plaintiff set for 10:00 a.m., on 4/14/88 reporter F. Rangus (gld) [Entry date 3/10/88]

3/9/88 — ALL PLEADINGS FILED AFTER 3/9/88 WILL BE FILED AND DOCKETED IN THE LEAD CASE 87-2284 (kc) [Entry date 3/14/88]

3/9/88 11 ORDER by Judge Oliver Gasch: granting status hearing oral motion by government to consolidate CA 88-440 with CA 87-2284 and 87-2412 (N) (kc) [Entry date 3/14/88]

3/10/88 9 REPLY MEMORANDUM by plaintiffs in support of motion for preliminary injunction [2-1] by plaintiff (gld) [Entry date 3/11/88]

3/11/88 10 MEMORANDUM by defendant GEORGE P. SHULTZ, defendant WILLIAM H. WEBSTER, defendant STEVEN GARFINKEL in opposition to motion for preliminary injunction [2-1]

by plaintiff; Exhibits (fiat) GASCH, J. (gld) [Entry date 3/14/88]

3/21/88 12 MOTION by plaintiffs in 1:88-cv-00440 for summary judgment (kc) [Entry date 3/23/88]

3/30/88 13 ORDER by Judge Oliver Gasch: granting motion for leave to file motion to dismiss second amended complaints with P&A's in excess of page limitation [44-1] in 1:87-cv-02284 (N) (kc) [Entry date 3/31/88]

4/6/88 14 ORDER by Judge Oliver Gasch: granting motion to extend time to file their reply brief in support of their motion for summary judgment [49-1] in 1:87-cv-02284 (N) (kc) [Entry date 4/11/88]

4/11/88 15 MEMORANDUM by plaintiffs Public Citizen Litigation Group in 1:88-cv-00440 in opposition to motion to dismiss [47-1] by defendant in 1:87-cv-02284 (kc) [Entry date 4/12/88]

4/21/88 — MOTION HEARING by defendant motion to dismiss [47-1] by NATL. FEDERATION and motion for preliminary injunction [37-1] taken under advisement; parties to file proposed findings and conclusions within ten (10) days in 1:87-cv-02284 before Judge Oliver Gasch: reporter E. Olsen (kc) [Entry date 4/22/88]

5/27/88 16 MEMORANDUM OPINION by Judge Oliver Gasch (N) (kc) [Entry date 6/7/88]

5/27/88 17 ORDER by Judge Oliver Gasch: denying motion for preliminary injunction [37-1] by NATL.

FEDERATION FED in 1:87-cv-02284, granting motion for summary judgment [38-1] in 1:87-cv-02284, denying motion for summary judgment 1:88-cv-00440, granting in part, denying in part motion to dismiss [47-1]; directing that counts I and III of the complaint are dismissed in CA 87-2284; directing that Counts III, IV, VI, VIII, IX, XI, XII, and XIII of the Complaint in CA 87-2412 are dismissed. CASE CLOSED AS TO CA 88-0440 ONLY in 1:87-cv-02284 (N) (kc) [Entry date 6/7/88]

6/3/88 ENTERED IN ERROR NOTICE OF APPEAL by plaintiff in 1:88-cv-00440 from order [17-1]; $5.00 filing paid. $100.00 Docketing fee not paid. Copies mailed to Wm. Robert Irvin, Freddi Lipstein and Solicitor General (kc) [Entry date 6/7/88 [Edit date 6/29/88]

6/3/88 19 NOTICE OF APPEAL by plaintiff in 1:88-cv-00440 to Supreme Court from order [17-1] $5.00 filing fee paid (kc) [Entry date 6/28/88]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FOREIGN SERVICE ASSOCIATION,
2101 E Street, N.W.
Washington, D.C. 20037,
REPRESENTATIVE JACK BROOKS,
Washington, D.C. 20515,
REPRESENTATIVE BARBARA BOXER,
Washington, D.C. 20515,
SENATOR CHARLES GRASSLEY,
Washington, D.C. 20510,
SENATOR WILLIAM PROXMIRE
Washington, D.C. 20510,
SENATOR DAVID PRYOR,
Washington, D.C. 20510,
REPRESENTATIVE PAT SCHROEDER,
Washington, D.C. 20515,
and
REPRESENTATIVE GERRY SIKORSKI,
Washington, D.C. 20515,
Plaintiffs,
v.
STEVEN GARFINKEL, DIRECTOR,
Information Security Oversight
Office,
18th & F Streets, N.W., Room 6046
Washington, D.C. 20405,
WILLIAM H. WEBSTER,
Director of Central Intelligence,
Washington, D.C. 20505,
and
GEORGE P. SHULTZ,
Secretary of State,
2201 C Street, N.W., 7th Floor
Washington, D.C. 20520,
Defendants.

88–0440
Feb 19, 1988
Gasch, J.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action seeks declaratory and injunctive relief from defendants' continued use of two standard nondisclosure forms in violation of Section 630 of the Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202, 100th Cong., 1st Sess. (Dec. 22, 1987)("Continuing Resolution") and the Administrative Procedure Act, 5 U.S.C. § 706.

2. This Court has jurisdiction under 28 U.S.C. § 1331.

PARTIES

3. Plaintiff American Foreign Service Association is a professional and labor association of foreign service employees, and is the certified bargaining representative for employees of the State Department. Most of its members have access to classified information, and many of them have access to Sensitive Compartmented Information. It has members who have signed Standard Form ("SF 4193") both before and after December 22, 1987, and who continue to be faced with its obligations and possible enforcement of its terms in respects not authorized by law. Since December 22, 1987, its members who are employed by the State Department have been required, and are still being required, to sign SF 4193.

4. Plaintiffs Charles Grassley, William Proxmire, and David Pryor are United State Senators, who rely on information furnished by federal employees in order to carry out their duties as Senators.

5. Plaintiffs Barbara Boxer, Jack Brooks, Pat Schroeder, and Gerry Sikorski are United States Representatives, who rely on information furnished by federal employees in order to carry out their duties as Representatives.

6. Defendant Steven Garfinkel is the Director of the Information Security Oversight Office ("ISOO"), and is responsible for overseeing compliance with the security classification system set forth in Executive Order 12,356, § 5.2, for implementing the requirement of National Security Decision Directive 84 ("NSDD-

84") that employees must sign a nondisclosure agreement as a condition of access to classified information, and for developing standard nondisclosure forms. Exec. Order 12,356, § 5.2(b)(7); NSDD-84 ¶ 1(c).

7. Defendant William H. Webster is the Director of Central Intelligence ("DCI") and is responsible under Executive Order 12,356, § 4.2(a), and 50 U.S.C. § 403(d)(3), for promulgating policies for the security, use, and dissemination of classified information concerning nondisclosure intelligence sources or methods, which is known as Sensitive Compartmented Information ("SCI"), including policies concerning nondisclosure agreements for those who have access to SCI.

8. Defendant George P. Shultz is the Secretary of State and the head of the State Department, a federal agency with employees who have access to classified information, including SCI, which has required its employees to sign SF 4193 since December 22, 1987.

BACKGROUND

9. On March 11, 1983, President Ronald Reagan issued NSDD- 84, which directs that all persons with access to classified information must sign approved nondisclosure agreements as a condition of access and which makes the Director of ISOO responsible for developing forms for this purpose.

10. In 1983, defendant Garfinkel issued Standard Form 189 ("SF 189") in accordance with NSDD-84's requirement and directed all agencies to require their employees who have access to classified information to sign SF 189.

11. Defendant Webster's predecessor approved SF 4193 in December 1981, and subsequently required all federal employees with access to SCI to sign SF 4193.

12. On December 22, 1987, the President signed the Continuing Resolution for Fiscal Year 1988. Section 630 thereof provides that "[n]o funds appropriated in this resolution or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement" that

contains any of five specified provisions, all of which are included in SF 189 and SF 4193.

13. After the President signed the Continuing Resolution, defendant Webster has continued to require employees with access to SCI to sign SF 4193 but has directed that during Fiscal Year 1988 SF 4193 should be accompanied by an addendum that states that "[t]he obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with the [Continuing Resolution]." At his direction, Lt. General Edward J. Heinz, the Director of Intelligence Community Staff, has stated in a declaration filed in a related case that a refusal to sign SF 4193 will result in a denial of access to SCI.

14. By letter dated December 29, 1987, defendant Garfinkel directed 69 federal agencies to stop requiring their employees to sign SF 189.

15. By letter dated January 27, 1988, defendant Garfinkel advised the same 69 federal agencies to treat SF 189 agreements executed on or after December 22, 1987, as voidable at the behest of the employee.

16. Defendant Garfinkel has issued no other directions to federal agencies regarding compliance with the Continuing Resolution.

17. After December 22, 1987, defendant Shultz has required, and is still requiring, State Department employees who have access to SCI to sign SF 4193.

18. Plaintiffs are irreparably injured by defendants' failure to comply with the Continuing Resolution because SF 4193 and SF 189 chill employees' constitutional and statutory rights to free speech and to petition Congress, and they impede the congressional plaintiffs' ability to obtain important information from federal employees, which they need to carry out their duties.

CAUSES OF ACTION

COUNT I (Continued Implementation)

19. By requiring federal agencies to have their employees sign SF 4193 after December 22, 1987, defendant Webster has

violated Section 630 of the Continuing Resolution and acted contrary to law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706.

COUNT II (Continued Implementation)

20. By requiring State Department employees to sign SF 4193 after December 22, 1987, defendant Shultz has violated Section 630 of the Continuing Resolution and acted contrary to law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706.

COUNT III (Continued Implementation)

21. By directing federal agencies to cease execution of SF 189, but advising them that all such agreements executed after December 22, 1987, are voidable at the behest of the employees, and not simply void, and by failing to tell such agencies that they should notify all employees who signed SF 189 after December 22, 1987, that such agreements are void, defendant Garfinkel acted arbitrarily and capriciously and not in accordance with law in violation of the APA, 5 U.S.C. § 706.

COUNT IV (Continued Enforcement)

22. By not requiring federal agencies to notify employees who signed SF 189s and SF 4193s both prior to and subsequent to December 22, 1987, that the five terms specified in the Continuing Resolution cannot be enforced during Fiscal Year 1988, defendants Webster and Garfinkel have violated the Continuing Resolution's ban on enforcement and have acted arbitrarily, capriciously, and contrary to law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706.

WHEREFORE, plaintiffs pray that this Court:

(1) Enter an order declaring

(A) that, by directing federal agencies to continue requiring individuals to sign SF 4193 after December 22, 1987, defendant Webster violated Section 630 of the Continuing Resolution and acted contrary to law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706;

(B) that, be requiring State Department employees and officers to sign SF 4193 after December 22, 1987, defendant

Shultz violated Section 630 of the Continuing Resolution and acted contrary to law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706; and

(C) that all SF 189 and SF 4193 agreements executed after December 22, 1987, are void;

(2) Enter a preliminary and permanent injunction

(A) enjoining defendant Shultz from requiring State Department employees and officers to sign SF 4193 during the remainder of Fiscal Year 1988;

(B) directing defendant Shultz to treat all SF 4193 agreements executed on or after December 22, 1987, as void, and to notify all State Department signatories that such agreements are void;

(C) directing defendants Garfinkel and Webster to prohibit federal agencies from requiring federal employees and officers to sign SF 4193 during the remainder of Fiscal Year 1988; and

(D) directing defendants Garfinkel and Webster to require federal agencies to treat all SF 189 and SF 4193 agreements executed after December 22, 1987, as void, and to notify all of the signatories of such agreements that they are void;

(3) Enter an order directing defendants Garfinkel and Webster to require federal agencies to notify all employees who have signed SF 189 and/or SF 4193 at any time that the five terms specified in the Continuing Resolution may not be enforced during Fiscal Year 1988;

(4) Award plaintiffs their costs and reasonable attorneys' fees in this action, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d); and

(5) Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/

Pl. Exhibit 2

THE WHITE HOUSE
WASHINGTON

National Security Decision Directive Number 84
March 11, 1983

Safeguarding National Security Information

As stated in Executive Order 12356, only that information whose disclosure would harm the national security interests of the United States may be classified. Every effort should be made to declassify information that no longer requires protection in the interest of national security.

At the same time, however, safeguarding against unlawful disclosures of properly classified information is a matter of grave concern and high priority for this Administration. In addition to the requirements set forth in Executive Order 12356, and based on the recommendations contained in the interdepartmental report forwarded by the Attorney General, I direct the following:

1. Each agency of the Executive Branch that originates or handles classified information shall adopt internal procedures to safeguard against unlawful disclosures of classified information. Such procedures shall at a minimum provide as follows:

a. All persons with authorized access to classified information shall be required to sign a nondisclosure agreement as a condition of access. This requirement may be implemented prospectively by agencies for which the administrative burden of compliance would otherwise be excessive.

b. All persons with authorized access to Sensitive Compartmented Information (SCI) shall be required to sign a

nondisclosure agreement as a condition of access to SCI and other classified information. All such agreements must include a provision for prepublication review to assure deletion of SCI and other classified information.

c. All agreements required in paragraphs 1.a. and 1.b. must be in a form determined by the Department of Justice to be enforceable in a civil action brought by the United States. The Director, Information Security Oversight Office (IS00), shall develop standardized forms that satisfy these requirements.

d. Appropriate policies shall be adopted to govern contacts between media representatives and agency personnel, so as to reduce the opportunity for negligent or deliberate disclosures of classified information. All persons with authorized access to classified information shall be clearly apprised of the agency's policies in this regard.

2. Each agency of the Executive branch that originates or handles classified information shall adopt internal procedures to govern the reporting and investigation of unauthorized disclosures of such information. Such procedures shall at a minimum provide that:

a. All such disclosures that the agency considers to be seriously damaging to its mission and responsibilities shall be evaluated to ascertain the nature of the information disclosed and the extent to which it had been disseminated.

b. The agency shall conduct a preliminary internal investigation prior to or concurrently with seeking investigative assistance from other agencies.

c. The agency shall maintain records of disclosures so evaluated and investigated.

d. Agencies in the possession of classified information originating with another agency shall cooperate with the originating agency by conducting internal investigations of the unauthorized disclosure of such information.

e. Persons determined by the agency to have knowingly made such disclosures or to have refused cooperation with investigations of such unauthorized disclosures will be denied further access to classified information and subjected to other administrative sanctions as appropriate.

3. Unauthorized disclosures of classified information shall be reported to the Department of Justice and the Information Security Oversight Office, as required by statute and Executive orders. The Department of Justice shall continue to review reported unauthorized disclosures of classified information to determine whether FBI investigation is warranted. Interested departments and agencies shall be consulted in developing criteria for evaluating such matters and in determining which cases should receive investigative priority. The FBI is authorized to investigate such matters as constitute potential violations of federal criminal law, even though administrative sanctions may be sought instead of criminal prosecution.

4. Nothing in this directive is intended to modify or preclude interagency agreements between FBI and other criminal investigative agencies regarding their responsibility for conducting investigations within their own agencies or departments.

5. The Office of Personnel Management and all departments and agencies with employees having access to classified information are directed to revise existing regulations and policies, as necessary, so that employees may be required to submit to polygraph examinations, when appropriate, in the course of investigations of unauthorized disclosures of classified information. As a minimum, such regulations shall permit an agency to decide that appropriate adverse consequences will follow an employee's refusal to cooperate with a polygraph examination that is limited in scope to the circumstances of the unauthorized disclosure under investigation. Agency regulations may provide that only the head of the agency, or his delegate, is empowered

to order an employee to submit to a polygraph examination. Results of polygraph examinations should not be relied upon to the exclusion of other information obtained during investigations.

6. The Attorney General, in consultation with the Director, Office of Personnel Management, is requested to establish an interdepartmental group to study the federal personnel security program and recommend appropriate revisions in existing Executive orders, regulations, and guidelines.

/s/ Ronald Reagan

Pl. Exhibit 3

CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT

An Agreement Between _____ and the United States
(Name - Printed or Typed)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to classified information. As used in this Agreement, classified information is information that is either classified or classifiable under the standards of Executive Order 12356, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security. I understand and accept that by being granted access to classified information, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of classified information, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and that I understand these procedures.

3. I have been advised and am aware that direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause irreparable injury to the United States or could be used to advantage by a foreign nation. I hereby agree that I will never divulge such information unless I have officially verified that the recipient has been properly authorized by the United States Government to receive it or I have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) last granting me a security

clearance that such disclosure is permitted. I further understand that I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information.

4. I have been advised and am aware that any breach of this Agreement may result in the termination of any security clearances I hold; removal from any position of special confidence and trust requiring such clearances; and the termination of my employment or other relationships with the Departments or Agencies that granted my security clearance or clearances. In addition, I have been advised and am aware that any unauthorized disclosure of classified information by me may constitute a violation or violations of United States criminal laws, including the provisions of Sections 641, 793, 794, 798, and 952, Title 18, United States Code, the provisions of Section 783(b), Title 50, United States Code, and the provisions of the Intelligence Identities Protection Act of 1982. I recognize that nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

5. I hereby assign to the United States Government all royalties, remunerations, and emoluments that have resulted, will result or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreement.

6. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement.

7. I understand that all information to which I may obtain access by signing this Agreement is now and will forever remain the property of the United States Government. I do not now, nor will I ever, possess any right, interest, title, or claim whatsoever to such information. I agree that I shall return all materials which have, or may have, come into my possession or for which I am

responsible because of such access, upon demand by an authorized representative of the United States Government or upon the conclusion of my employment or other relationship with the Department or Agency that last granted me a security clearance. If I do not return such materials upon request, I understand that this may be a violation of Section 793, Title 18, United States Code, a United States criminal law.

8. Unless and until I am released in writing by an authorized representative of the United States Government, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to classified information, and at all times thereafter.

9. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect.

10. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available to me Sections 641, 793, 794, 798 and 952 of Title 18, United States Code, Section 783(b) of Title 50, United States Code, the Intelligence Identities Protection Act of 1982, and Executive Order 12356, so that I may read them at this time, if I so choose.

11. I make this Agreement without mental reservation or purpose of evasion.

SIGNATURE	DATE	SOCIAL SECURITY NO. (See notice below)
ORGANIZATION		

The execution of this Agreement was witnessed by the undersigned, who, on behalf of the United States Government, agreed to its terms and accepted it as a prior condition of authorizing access to classified information.

WITNESS AND ACCEPTANCE:

SIGNATURE	DATE
ORGANIZATION	

NOTICE: The Privacy Act, 5 U.S.C. 552a, requires that all federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Account Number (SSN) is Executive Order 9397. Your SSN will be used to identify you precisely when it is necessary to 1) certify that you have access to the information indicated above, 2) determine that your access to the information indicated has terminated, or 3) certify that you have witnessed a briefing or debriefing. Although disclosure of your SSN is not mandatory, your failure to do so may impede such certifications or determinations.

STANDARD FORM 189 (8/83)
Prescribed by GSA/ISOO
32 CFR 2003:E.O. 12356

Pl. Exhibit 5

SENSITIVE COMPARTMENTED INFORMATION NON-DISCLOSURE AGREEMENT

An Agreement Between _____ and the United States

(Name - Printed or Typed)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to information protected within Special Access Programs, hereinafter referred to in this Agreement as Sensitive Compartmented Information (SCI). I have been advised that SCI involves or derives from intelligence sources or methods and is classified or classifiable under the standards of Executive Order 12065 or other Executive order or statute. I understand and accept that by being granted access to SCI, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of SCI, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and I understand these procedures. I understand that I may be required to sign subsequent agreements upon being granted access to different categories of SCI. I further understand that all my obligations under this Agreement continue to exist whether or not I am required to sign such subsequent agreements.

3. I have been advised that direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of SCI by me could cause irreparable injury to the United States or be used to advantage by a foreign nation. I hereby agree that I will never divulge such information to anyone who is not authorized

to receive it without prior written authorization from the United States Government department or agency (hereinafter Department or Agency) that last authorized my access to SCI. I further understand that I am obligated by law and regulation not to disclose any classified information in an unauthorized fashion.

4. In consideration of being granted access to SCI and of being or retained in a position of special confidence and trust requiring access to SCI, I hereby agree to submit for security review by the Department or Agency that last authorized my access to such information, all information or materials, including works of fiction, which contain or purport to contain any SCI or description of activities that produce or relate to SCI or that I have reason to believe are derived from SCI, that I contemplate disclosing to any person not authorized to have access to SCI or that I have prepared for public disclosure. I understand and agree that my obligation to submit such information and materials for review applies during the course of my access to SCI and thereafter, and I agree to make any required submissions prior to discussing the information or materials with, or showing them to, anyone who is not authorized to have access to SCI. I further agree that I will not disclose such information or materials to any person not authorized to have access to SCI until I have received written authorization from the Department or Agency that last authorized my access to SCI that such disclosure is permitted.

5. I understand that the purpose of the review described in paragraph 4 is to give the United States a reasonable opportunity to determine whether the information or materials submitted pursuant to paragraph 4 set forth any SCI. I further understand that the Department or Agency to which I have submitted materials will act upon them, coordinating within the Intelligence Community when appropriate, and make a response to me within a reasonable time, not to exceed 30 working days from date of receipt.

6. I have been advised that any breach of this Agreement may result in the termination of my access to SCI and retention in a position of special confidence and trust requiring such access, as well as the termination of my employment or other relationships with any Department or Agency that provides me with access to SCI. In addition, I have been advised that any unauthorized disclosure of SCI by me may constitute violations of United States criminal laws, including the provisions of Sections 793, 794, 798, and 952, Title 18, United States Code, and of Section 783(b), Title 50, United States Code. Nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

7. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement. I have been advised that the action can be brought against me in any of the several appropriate United States District Courts where the United States Government may elect to file the action. Court costs and reasonable attorneys fees incurred by the United States Government may be assessed against me if I lose such action.

8. I understand that all information to which I may obtain access by signing this Agreement is now and will forever remain the property of the United States Government. I do not now, nor will I ever, possess any right, interest, title, or claim whatsoever to such information. I agree that I shall return all materials, which may have come into my possession or for which I am responsible because of such access, upon demand by an authorized representative of the United States Government or upon the conclusion of my employment or other relationship with the United States Government entity providing me access to such materials. If I do not return such materials upon request, I understand this may be a violation of Section 793, Title 18, United States Code, a United States criminal law.

9. Unless and until I am released in writing by an authorized representative of the Department or Agency that last provided me with access to SCI, I understand that all conditions and obligations imposed upon by this Agreement apply during the time I am granted access to SCI, and at all times thereafter.

10. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect. This Agreement concerns SCI and does not set forth such other conditions and obligations not related to SCI as may now or hereafter pertain to my employment by or assignment or relationship with the Department or Agency.

11. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available Sections 793, 794, 798, and 952 of Title 18, United States Code, and Section 783(b) of Title 50, United States Code, and Executive Order 12065, as amended, so that I may read them at this time, if I so choose.

12. I hereby assign to the United States Government all rights, title and interest, and all royalties, remunerations, and emoluments that have resulted, will result, or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreement.

13. I make this Agreement without any mental reservation or purpose of evasion.

_____ _____

SIGNATURE DATE

The execution of this Agreement was witnessed by the undersigned who accepted it on behalf of the United States Government as a prior condition of access to Sensitive Compartmented

Information.

WITNESS and ACCEPTANCE:

SIGNATURE _____ DATE _____

SECURITY BRIEFING ACKNOWLEDGMENT

I hereby acknowledge that I was briefed on the following SCI Special Access Program(s):

_____

(Special Access Programs by Initials Only)

_____ _____

Signature of Individual Briefed Date Briefed

_____

Printed or Typed Name

_____ _____

Social Security Number (See Notice Below) Organization (Name nd Address)

I certify that the above SCI access(es) were approved in accordance with relevant SCI procedures and that the briefing presented by me on the above date was also in accordance therewith.

_____

Signature of Briefing Officer

_____

Printed or Typed Name

_____ _____

Social Security Number (See Notice Below) Organization (Name and Address)

SECURITY DEBRIEFING ACKNOWLEDGMENT

Having been reminded of my continuing obligation to comply with the terms of this Agreement, I hereby acknowledge that I was debriefed on the following SCI Special Access Program(s):

_____

(Special Access Programs by Initials Only)

_____ _____

Signature of Individual Briefed Date Briefed

_____

Printed or Typed Name

_____ _____

Social Security Number (See Notice Below) Organization (Name and Address)

I certify that the debriefing presented by me on the above date was in accordance with relevant SCI procedures.

_____

Signature of Briefing Officer

_____

Printed or Typed Name

_____ _____

Social Security Number (See Notice Below) Organization (Name and Address)

NOTICE: The Privacy Act, 5 U.S.C. § 522a, [sic] requires that all federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Ac-

count Number (SSN) is Executive Order 9397. Your SSN will be used to identify you precisely when it is necessary to 1) certify that you have access to the information indicated above, 2) determine that your access to the information indicated has terminated, or 3) certify that you have witnessed a briefing or debriefing. Although disclosure of your SSN is not mandatory, your failure to do so may impede such certifications or determinations.

Form 4193 12/81	Obsolete Previous Edition	(Replace Forms 4066, 3968, 4193a and 4193b which are obsolete and will not be used)

Pl. Exhibit 6

[Caption]

DECLARATION OF LT. GENERAL EDWARD J. HEINZ

I, LT. GENERAL EDWARD J. HEINZ, USAF, declare as follows:

1. I am the Director of the Intelligence Community Staff, which is a staff element of the Director of Central Intelligence (DCI) that was created under the authority of Executive Order 12333. I submit this Declaration pursuant to the Court's Order of February 2, 1988.

2. Pursuant to Section 102(d) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3), and Executive Order 12356, the Director of Central Intelligence (DCI) is responsible for promulgating policies and procedures for the security, use, and dissemination of Sensitive Compartmented Information (SCI). SCI is classified information, concerning or derived from intelligence sources, methods or analytical processes, which is required to be handled within formal access control systems established by the DCI.

3. In my capacity as Director of the Intelligence Community Staff, I am responsible for assisting the DCI in establishing security policy with respect to SCI. The DCI has directed that the signing of a DCI-authorized nondisclosure agreement is a condition of access to SCI and has made available Form 4193 ("Sensitive Compartmented Information Nondisclosure Agreement") for Government-wide use for this purpose. I am responsible for the administration and implementation of Form 4193 throughout the Government.

4. In response to Section 630 of the Omnibus Continuing Resolution for FY 1988, Public Law 100-202, I am reviewing, in consultation with the Department of Justice, the continued use of Form 4193 and am considering whether to revise Form 4193 in light of this legislation. Meanwhile, in order to ensure that implementation and enforcement of nondisclosure agreements

that protect SCI will be consistent with Section 630, I have issued instructions to all departments, agencies and offices responsible for SCI indoctrinations and debriefings. I have directed that, during Fiscal Year 1988, Form 4193, and any other nondisclosure agreements used for the protection of SCI, shall only be used when accompanied by a special addendum which states:

> The obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with the section entitled "Employee Disclosure Agreements" contained in P.L. 1000-202, [sic] Continuing Appropriations for Fiscal Year 1988, 22 December 1987, and other applicable law.

A copy of Form 4193 accompanied by the special addendum is attached hereto as Exhibit A. Refusal of the person seeking access to SCI to sign an SCI nondisclosure form, as modified by the special addendum, will result in denial of access to SCI.

5. I declare under penalty of perjury that the foregoing is true to the best of my belief.

/s/ Edward J. Heinz
Edward J. Heinz, Lt. General, USAF

Date: 9 Feb 1988

The obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with the section entitled "Employee Disclosure Agreements" contained in P.L. 100-202, Continuing Appropriations for Fiscal Year 1988, 22 December 1987, and other applicable law.

Witness Signature	Signature
Date: _____	Date: _____

Pl. Exhibit 7

[Caption]

AFFIDAVIT OF STEVEN GARFINKEL

I, Steven Garfinkel, Director, Information Security Oversight Office, being duly sworn, hereby make the following statement:

1. I have served as Director of the Information Security Oversight Office (ISOO) since May 1980. Under Executive Order 12356, "National Security Information," the ISOO Director is responsible to the President for overseeing the security classification system throughout the executive branch, and for reporting to the President annually on the status of that program. Further, under National Security Decision Directive 84, signed by the President on March 11, 1983, the ISOO Director is responsible for implementing a standardized nondisclosure agreement between individuals and the United States to be executed as a condition of access to classified information. In fulfilling this responsibility, on September 9, 1983, I issued the Standard Form 189, "Classified Information Nondisclosure Agreement" (SF 189). Following the issuance of the SF 189, I oversaw its implementation throughout the executive branch.

2. Following the Congress' passage of the Continuing Resolution for Fiscal Year 1988 (Public Law 100-202), I learned that it contained language that possibly affected the use of appropriated funds during the remainder of FY 1988 to implement and enforce the SF 189. I determined that the best course of action for ISOO to take with respect to the SF 189 was to suspend its further implementation, at least until I had received a formal opinion of the Attorney General or his representative on the impact of the enacted legislation. Accordingly, on December 29, 1987, I delivered or mailed a letter to the senior agency official for the information security program of 69 departments, agencies, or independent offices that create or handle national security information. Among other instructions, the letter directed each agency pending further instructions to "[c]ease any addi-

tional implementation of [the August 1983 edition] of the SF 189 . . .." A copy of my letter of December 29, 1987, is attached to this affidavit as Exhibit A. The names and addresses of the officials to whom I addressed this letter are attached to this affidavit as Exhibit B.

3. On January 27, 1988, I delivered or mailed another letter to the officials listed in Exhibit B to supplement my instructions contained in the letter of December 29, 1987. The second letter directed agencies to ". . . take reasonable steps to notify all affected employees that until further notice [the agencies] will treat an SF 189 . . . executed on or after December 22, 1987, as voidable at the behest of the employee who signed it." A copy of my letter of January 27, 1988, is attached to this affidavit as Exhibit C.

4. Since my letter of January 27, 1988, I have issued no further instructions nor propounded any further policy with respect to the implementation of the SF 189. I have read the statement above, consisting of three pages, and declare, under penalty of perjury, that it is true and complete to the best of my knowledge and belief.

/s/ Steven Garfinkel
Steven Garfinkel

[Notarized]

Pl. Exhibit 8

EXHIBIT A

Information Security Oversight Office
Washington, D.C. 20405

COPY

December 29, 1987

Dear (Salutation):

A last minute rider to the Continuing Resolution for Fiscal Year 1988 (Section 630 of Public Law 100-202, copy enclosed), passed by Congress on December 21, and signed by the President on December 22, 1987, places limitations on the implementation and enforcement of the Standard Form 189, "Classified Information Nondisclosure Agreement." The Information Security Oversight Office (ISOO) will seek an Opinion of the Attorney General on the impact if this legislation on the SF 189 and the SF 189-A, "Classified Information Nondisclosure Agreement (Industrial/ Commercial/Non-Government)." In the interim, and pending further instructions, please implement the following actions at once, including immediate notification to all affected subordinate activities:

1. Cease any additional implementation of existing editions of the SF 189 and SF 189-A. That is, do not have any other personnel execute the August 1983 edition of SF 189, or the June 1986 edition of SF 189-A. ISOO intends to issue as quickly as possible revised editions of each form. You will be provided further instructions as they become available.

2. Do not destroy any existing executed copies of SF 189 and SF 189-A. If at all possible, ISOO will seek to maintain their validity to the extent that they are consistent with the language of Pub. L. 100-202 and revised editions of the forms.

3. Continue the moratorium on any action against a cleared individual who has refused to execute SF 189 in the past. In all likelihood, this moratorium will be lifted when new editions of the nondisclosure agreements are available.

4. Brief cleared unsigned personnel fully on their obligations to protect classified information, and on the sanctions that may result from unauthorized disclosures.

5. Take all appropriate sanctions against personnel who disclose classified information without authority, whether they have signed a nondisclosure agreement or not. Consult with agency counsel, Justice Department counsel, or ISOO concerning the enforceability of executed nondisclosure agreements in taking such actions.

Please contact your ISOO liaison or me at FTS 535-7251 (commercial (202) 535-7251), if you have any questions.

Sincerely,

/s/ Steven Garfinkel

Steven Garfinkel
Director

Pl. Exhibit 9

EXHIBIT C
Information Security Oversight Office
Washington, D.C. 20405
January 27, 1988 COPY

Dear (Salutation):

On December 29, 1987, the Information Security Oversight Office (ISOO) provided interim instructions to your agency concerning the implementation and enforcement of the Standard Form 189, "Classified Information Nondisclosure Agreement," and the SF 189-A, "Classified Information Nondisclosure Agreement (Industrial/Commercial/Non-Government)," in response to Sec. 630 of Public Law 100-202, the Continuing Resolution for FY 1988. Among these instructions were the requirements to cease the execution by employees of the current editions of SF 189 or SF 189-A, and to retain all existing signed copies of the agreements. This letter supplements those instructions by addressing the handling of those nondisclosure agreements that are dated on or after December 22, 1987; that is, those that are executed between the day that the President signed the Continuing Resolution into law and the time that agency and contractor units receive and carry out the instruction to halt implementation.

At this time the enforceability of these agreements is unclear, and ISOO will seek the advice of the Justice Department on this issue. In the interim, however, agencies shall take reasonable steps to notify all affected employees that until further notice they will treat an SF 189 or SF 189-A executed on or after December 22, 1987, as voidable at the behest of the employee who signed it. At the request of an employee, the agency must take action to void this particular written agreement. The

employee shall then be considered as a cleared non-signatory, who must be briefed on his or her continuing responsibility to protect classified information and the sanctions that may follow from the failure to do so. Ultimately, of course, all persons who have not yet signed a nondisclosure agreement will be required to do so as a condition of access to classified information, in accordance with the President's directive of March 11, 1983.

Sincerely,

/s/ Steven Garfinkel
Steven Garfinkel

Name
Title Director Agency
Address
City
State

Pl. Exhibit 10

AFFIDAVIT OF REPRESENTATIVE BARBARA BOXER

I, Barbara A. Boxer, hereby state as follows:

1. I am a United States Representative from California.

2. I am concerned the SF 189 will impede the flow of information to Congress. The word "classifiable" is so broad and vague that it could "arguably" include anything, to use the words of Steven Garfinkel, the Director of the Information Security Oversight Office. In particular, whistleblowers could be held responsible for disclosing information to Congress, even information that is unclassified but might be retroactively designated as classified after the disclosure.

3. SF 189 would almost certainly have a chilling effect on conscientious public servants considering whether to report such matters as waste, fraud, and abuse to Congress, the Inspector General, or any other authorized recipient. This deterrent is particularly dangerous because government employees are already afraid to stick their necks out and risk their careers to make such disclosures. My staff and I have dealt with numerous whistleblowers who have been fearful of the consequences that might flow from their disclosures. Some have required anonymity. I am concerned that the added deterrent of signing SF 189 will silence otherwise well-meaning employees.

4. Without the information provided by federal employees, both Congress and the American people are at a terrible disadvantage. For instance, the House Armed Services Committee depended on candid upfront assessments by military and civilian field personnel in its investigations of problems of both the B-1 Bomber and the MX missile. Likewise, information about faulty and overpriced weapons and spare parts has come from both civilian and military employees of the Department of Defense. In addition, I obtained information from a whistleblower about reservists remaining in Central America for tours that exceeded

the legal time limit on such stays.

5. Although the executive branch provides information to Congress, the information voluntarily provided by the Administration is not sufficient to enable us to fulfill our responsibilities. That information is often one-sided and self-serving and is not sufficient for Congress to probe wrongdoing or mismanagement that the Administration is trying to hide. Whistleblowers often provide leads that direct Congress to a problematic aspect of what may be an otherwise impenetrable subject matter, which is what happened with disclosures about the B-1 Bomber and MX missiles.

6. Although Congress has subpoena power, it would be infeasible for Congress to rely solely on that power to conduct oversight operations. This is because the subpoena enforcement process is rarely invoked, and even then it is long and cumbersome. Subpoenas place the executive and legislative branches at loggerheads and thus heighten the adversarial rather than the cooperative aspects of the relationship, which is counterproductive in the long run.

7. Without the clues that whistleblowers often furnish, Congress would need to commence broad fishing expeditions to uncover matters worthy of more in-depth congressional oversight. It would be both infeasible and inefficient for Congress to ask for everything about the B-1 Bomber program, for example, in an attempt to discover fraud, technical deficiencies, and other problems.

8. Another provision of SF 189 will deter federal employees from providing information to Congress. If an employee provides me with information and I release it, then the employee can be held liable for my actions. In the past, I have served as the intermediary between a whistleblower and the public. For example, after a federal employee gave me information about reservist tours that extended beyond the legal limit, I provided that information to the press. By maintaining his anonymity, I hoped to save the employee from additional adverse job actions.

9. Not only does the Administration view Members of Congress as unauthorized to receive classified information without executive branch approval, but it also seeks to bind us to SF 189. When I sought access to a General Accounting Office report on homeporting from the Department of Energy, I received a letter from Troy E. Wade, Acting Assistant Secretary for Defense Programs, asking me to sign SF 189 as a condition of receiving the report. Although I signed the form in error at the time, I have since revoked my unintended agreement because I do not believe it is appropriate for the executive branch to bind a Member of Congress in this way. Letter to Secretary of Energy John Herrington from Congresswoman Barbara Boxer (October 16, 1987).

Pursuant to 28 U.S.C. § 1746 and Local Rule 106(g), I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of November, 1987.

/s/ Barbara Boxer
Barbara Boxer

Pl. Exhibit 11

[Caption]

AFFIDAVIT OF SENATOR CHARLES E. GRASSLEY

I, Senator Charles E. Grassley, hereby state as follows:

1. I am a United States Senator from Iowa.

2. I am concerned the Standard Form 189 ("SF 189") will deter federal employees from providing information to Congress. The Administration has made it clear that Members of Congress are not authorized to receive "classified or classifiable information," unless high-level agency officials decide that they have a need-to-know that information. Not only will this prior approval requirement deter whistleblowers from providing classified information to Congress as provided for by federal statute, but it will also deter them from communicating a whole range of unclassified information because of the use of the extremely broad and vague concept of "classifiable information."

3. Federal employees provide Members of Congress useful information that may not be forthcoming from the Administration. On one occasion, the Administration would not authorize Air Force Management Systems Deputy A. Ernest Fitzgerald, who had useful and valuable cost information that did not comport with the "official line," to appear at a congressional hearing in his capacity as an official Air Force cost analyst. As the Chairman of the subcommittee holding the hearing, and in order to secure Mr. Fitzgerald's official testimony, I was forced to drive to the Pentagon and personally serve on him a subpoena. On another occasion, I invited Defense Department budget analyst Franklin "Chuck" Spinney to my office to provide me with his defense budget briefing entitled "Plans/Reality Mismatch," since I was deliberating about budget deficit problems as a member of the Senate Budget Committee. At first, then-Defense Secretary Cap Weinberger agreed to allow Mr. Spinney

to brief me. Four days later, he reneged, and I was forced instead to go to extraordinary lengths to secure Mr. Spinney's testimony before an unprecedented joint hearing of the Senate Budget and Armed Services Committees. These examples illustrate the dangers inherent in the executive branch determining whether Congress is authorized to hear from any particular federal employee or to receive any given piece of information.

4. Although I endorse legitimate attempts by any branch of government to prevent disclosures of properly classified information the disclosure of which could harm national security, I have concluded based on my personal involvement and dealings with executive branch officials on this matter that SF 189 is an attempt to go way beyond the legitimate protection of classified information.

5. Over the past several months, I have negotiated with officials of different agencies and the White House to work out a reasonable definition of the term "classifiable." I sought to replace the Federal Register definitions with narrower language taken directly from a fact sheet issued by the Information Security Oversight Office. That language defines "classifiable" as

> unmarked information that already is classified, or meets the standards for classification and is in the process of being classified. It does not refer to unclassified information that might, perchance, be classified sometime in the future. The only fact pattern in which an employee might be held liable for disclosing unclassified information could occur when the employee knows, or reasonably should know, that the information is in the process of a classification determination and requires interim protection as provided in Section 1.1(c) of Executive Order 12356.

Although the term "unmarked classified information" is inherently contradictory because classified information is by definition marked as such under the terms of the controlling Executive

Order, the latter part of this definition would prevent officials from classifying information in order to retaliate against whistleblowers who reveal the information when it is not classified.

6. However, the Administration reneged on its initial acceptance of this narrower definition, leaving me to wonder whether the Administration wants the latitude afforded by this vague term, which I believe threatens both the First Amendment and statutory rights of federal employees and the rights of Congress to receive information.

7. During the past week, Administration officials have indicated that they are interested in reopening negotiations. I have directed them to appropriate congressional channels so that future negotiations will proceed in a more accountable manner.

Pursuant to 28 U.S.C. § 1746 and Local Rule 106(g), I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of November, 1987.

/s/Chuck Grassley
Charles E. Grassley

Def. Exhibit 4

[Caption]

DECLARATION OF WILLIAM H. WEBSTER
DIRECTOR OF CENTRAL INTELLIGENCE

I, William H. Webster, declare as follows:

1. I am the Director of Central Intelligence (DCI), and have served as DCI since 26 May 1987. As the DCI, I am the head of the Central Intelligence Agency. In my current position I also serve as the primary advisor to the President of the United States on matters of national foreign intelligence, and I am responsible for coordinating the national intelligence activities of the civilian and military departments, agencies, and elements comprising the United States Intelligence Community.

2. I understand that I have been named as a defendant, in my official capacity, in the above-captioned action. I also understand that the plaintiffs are seeking a preliminary injunction against continued use of Form 4193 on the ground that the use violates recent legislation. I am submitting this declaration in support of the defendants' opposition to plaintiffs' motion for a preliminary injunction and pursuant to my duties as DCI as set forth in the National Security Act of 1947, 50 U.S.C. § 402, et seq. and Executive Order 12333, entitled "United States Intelligence Activities."

3. Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3), and section 1.5(h) of Executive Order 12333 provide that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure. Certain classified information relating to intelligence sources and methods is so sensitive that it must be placed within special access programs to control access to, distribution and protection of such information. This type of information is referred to as Sensitive Compartmented Informa-

tion (SCI). Under the authority of the National Security Act, Executive Order 12333, and Section 4.2(a) of Executive order 12356, entitled "National Security Information," I have the responsibility for the creation of special access programs pertaining to intelligence activities, sources and methods. The SCI security system was established in fulfillment of this responsibility. As I will describe, Form 4193, entitled "Sensitive Compartmented Information Nondisclosure Agreement," is an integral part of the security system established to protect intelligence sources and methods relating to SCI.

4. Generally speaking, SCI consists of data describing sophisticated technical systems for collecting intelligence and the information collected by those systems. Because of the extreme sensitivity of this information and material, SCI requires special controls for restricted handling within designated compartments. These compartments provide extraordinary security protection for those intelligence activities that, if comprised, could reasonably be expected to cause severe harm to the national security. The nature, sensitivity and fragility of SCI is described in the report of the DCI Security Committee, attached hereto as Exhibit A and entitled "Sensitive Compartmented Information: Characteristics and Security Requirements."

5. Pursuant to my responsibilities under the National Security Act, Executive Order 12333, and Executive Order 12356, I have promulgated standards governing access to SCI, including the requirement that Form 4193, or an equivalent nondisclosure form, be signed as a condition of personal access to SCI. Prior to 22 December 1987, Government employees and contractor personnel seeking access to SCI were required to sign the Form 4193 or an equivalent form. Since 22 December 1987, I have required Government employees and contractor personnel who access to SCI to sign the Form 4193 and an addendum that states that Form 4193 will be implemented and enforced in a manner consistent with 630 of the Treasury, Postal Service and General Government Appropriations Act, 1988, as incorporated in the

Omnibus Continuing Appropriations Resolution for Fiscal Year 1988, Pub. L. No. 100-202 and applicable law. I was advised by my Office of General Counsel that use of this addendum in conjunction with Form 4193 was an appropriate means, consistent with law, to ensure continued protection of SCI. The Office of Legal Counsel of the Department of Justice concurred with this view.

6. My staff is currently considering modifications of the Form 4193 in light of the new legislation. If approved, a new form will be distributed to all agencies and departments currently using the Form 4193 accompanied by the addendum. In the interim, however, it is essential to continue to use the current Form 4193 in a manner consistent with the law and my responsibility to protect SCI. As discussed below, Form 4193 contains a number of provisions which aid me in fulfilling this responsibility.

7. The form establishes a precise contractual relationship between the United States Government and an individual granted access to SCI. Remedies for violating the obligations imposed by this agreement may include damages, injunctive relief, and the imposition of a constructive trust. If the Government could not use the Form 4193, accompanied by the addendum, I believe that this could create severe difficulties in my ongoing efforts to protect SCI from unauthorized disclosure. This is so for several reasons. First, SCI would no longer be protected by the form's pre-publication review provision. This key pre-publication review provision ensures that persons with access to SCI seek review of certain designated material that they intend to provide to unauthorized persons or the public. Absent this provision, the Government could not require review of material that might contain SCI prior to the actual disclosure. In other words, a person with access to SCI would be under no obligation to receive approval prior to publication. If the Government wished to take action against such disclosures, the Government would be forced to wait until the disclosures took place. Pursuit of that remedy could require the Government to confirm the informa-

tion, thereby damaging intelligence sources and methods and possibly compounding that damage through additional disclosures. For these reasons, the pre-publication review feature is a critical component of Form 4193 and of the SCI security program. If continued use of Form 4193 with the addendum were enjoined, the pre-publication review clause would also necessarily fail, significantly impairing my ability to protect SCI.

8. Second, there is a strong need for the personal obligations established by the Form 4193. Without the discipline and protection afforded by these obligations, there is a greater opportunity and risk for inadvertent or even deliberate disclosure of SCI. The remedies granted by the courts thus far for violating the obligations contained in similar agreements have created strong disincentives for people to violate their agreements and have greatly lessened the risk of compromising classified information. Equally important, Form 4193 and equivalent forms underscore on an individual level the importance of protecting SCI and have sensitized individuals of their personal obligations to protect SCI on a daily basis.

9. As the attached report indicates, a large number of people are needed to develop, build, and operate SCI systems and to analyze the SCI material collected. Thus, there is a great risk of unauthorized disclosure of SCI. Safeguards are essential to protect against such disclosures and the potential countermeasures of foreign intelligence services. Such safeguards are essential for me to function effectively in my role as DCI and to provide the necessary, timely dissemination of sensitive intelligence to U.S. policymakers.

10. The need for special measures, including Form 4193, to protect SCI is also dictated by the need to protect the special systems involved. The compromise of an SCI technical system could be devastating and could result in the unavailability of critical intelligence. Such a severe compromise might also mean loss of valuable intelligence about "denied areas" (i.e., intelligence information not available by any other means) and could

require the development of completely new, extremely expensive, state-of-the-art systems. Additionally, if an SCI system is compromised, hostile intelligence services have the option of running deception operations—such as providing misleading data which may result in flawed U.S. foreign and defense policies or decision.

11. Another significant harm that could result from the inability to use the form is the impairment of our damage assessment capability for the unauthorized disclosure of SCI. The form presently represents a primary means for the Government to keep track of individuals possessing SCI access. This tracking system often enables the Government to determine who had access to the SCI disclosed at the time of the compromise and thus, who could have made the unauthorized disclosure. Clearly, this ability is needed to monitor disclosures, intentional or otherwise, of SCI.

12. In summary, Form 4193 with the addendum is a valuable part of the Government's ongoing efforts to protect SCI from unauthorized disclosure. As previously stated, the approval and possible distribution of a new form is currently being considered. In the interim, I submit that the enjoining of this form could cause great difficulties for me in carrying out my responsibilities to protect intelligence sources and methods, and particularly SCI, from unauthorized disclosure.

13.I declare under penalty of perjury that the foregoing is true to the best of my knowledge and belief.

/s/William H. Webster
William H. Webster
Director of Central Intelligence

Date: 1 March 1988

EXHIBIT A IN SUPPORT OF THE DECLARATION OF WILLIAM H. WEBSTER

Director of Central Intelligence
DCI

Sensitive Compartmented Information:
Characteristics and Security
Requirements

Prepared by
The
Security
Committee

June 1984

Preface

This paper on the nature of sensitive Compartmented Information (SCI) and pertinent controls was originally produced at the CONFIDENTIAL level in March 1984. It was intended for background use by legislative liaison officers responding to Congressional inquiries about SCI security requirements. It has been redrafted for issuance as an unclassified text because SCI security recently has become a matter of interest to all three branches of Government. The concept of providing special systems of compartmented protection to entire programs of intelligence collection and production is not widely known or understood. This paper is intended to assist those who must officially consider various aspects of SCI without the benefit of extensive experience with these programs.

In the continuing discussions of the appropriate security measures for protecting Sensitive Compartmented Information (SCI), including polygraph examinations and nondisclosure agreements, there has been little or no attention to what SCI is. These discussions raise issues about SCI which include:

> Does the nature of SCI lend itself to varying levels and kinds of security protection? Is the SCI accessed by "consumers" essentially different from the SCI dealt with by "producers"? Should some individuals be subject to stricter security screening for SCI access than others? Should the personnel of agencies not engaged in collecting or producing intelligence meet the same security standards for SCI access as those of intelligence agencies? Should political appointees be required to protect SCI from disclosure in the same manner as career federal employees? Are those who are granted access to SCI required to meet a higher standard of personnel security than those cleared for non-compartmented Confidential, Secret or Top Secret Information? Is there a different assessment of acceptable risk in the SCI systems than for other classified information?

This report attempts to describe what SCI is, why it is sensitive, why the revelation of SCI that an unwary individual might consider insignificant or trivial can be damaging to an entire program for SCI collection, and why we should not be willing to accept any perceptible level of risk in decisions on personnel being granted access to SCI.

Sensitive Compartmented Information is data about sophisticated technical systems for collecting intelligence and the information collected by those systems. The characteristics of the systems that necessitated the development of SCI programs are (a) that compared to conventional intelligence activities employ-

ing human sources, many more people normally must know sensitive information in order to develop, build, and operate the systems and to analyze the material they collect; (b) that they generally produce large quantities of accurate, detailed intelligence, which is needed and relied upon by senior planners and policymakers, and which, by its nature, is extremely fragile, in that it reveals the characteristics of the systems that collect it; and (c) that they are extremely vulnerable to adversary countermeasures, i.e., denial or deception.

Most people can easily understand the need for tight security in classic espionage operations employing live agents. The need for strong security is dictated by the need for source protection and, of course, it is clear that the apprehension of an agent results in the loss of valuable intelligence. The neutralization of a technical collection system is more akin to the loss of a whole agent network than to the loss of a single agent and the loss of such systems has severe consequences. These include the loss of valuable intelligence about "denied areas" which is not available by any other means; the cost of developing and producing new technical collection systems, which are extremely expensive, state-of-the-art programs; and the risks to the national security attendant to a lack of knowledge of what our adversaries are up to.

Communications intelligence, as defined by 18 U.S.C. 798, is the classic example of SCI, and normally is derived from intercepted communications. The unauthorized disclosure of such intelligence can reveal to the target country which of its messages are being intercepted and which ones are being read. If the targeted country takes the clearly indicated countermeasures, no further intelligence can be expected from that source and by that method. Similarly, the compromise of other technical collection systems, or intelligence derived from them, can tell our adversaries the capabilities of the systems and how to

take countermeasures. Even worse, once the target country's government knows what the systems collect and how it is collected, it has the option of conducting deception operations, i.e., providing misleading data which may result in defective U.S. foreign and defense policies.

To guard against these risks, SCI security control systems have been evolved in the years since World War II, when the Japanese and German cryptographic systems were broken by the Allies, furnishing intelligence which was vital to victory over the Axis Powers. In structuring these systems, the lessons of Pearl Harbor have been borne in mind ... the systems must permit timely dissemination of sensitive intelligence to those who need it to guide and carry out U.S. defense and foreign policy. Over the years, it has been demonstrated that the recipients' confidence in intelligence reporting has a direct relationship to the recipients' knowledge of the source or method producing it. Because of the amount of intelligence produced by the SCI systems and its broad utility, those with access to SCI number in the thousands.

The authority for SCI control systems is based upon the statutory responsibility of the Director of Central Intelligence (DCI), under the National Security Act of 1947, for the protection of intelligence sources and methods, and upon Executive Order 12356, which authorizes him to create special access programs for especially sensitive intelligence activities.

SCI systems, therefore, cover activities and information of extraordinary sensitivity and fragility from a security standpoint. They serve to restrict access to the protected information to persons who (a) have a clearly established official need for that information, and (b) who meet more rigorous and stringent personnel security criteria. Persons cleared for Confidential, Secret, or Top Secret information are not automatically eligible

by virtue of those clearances for access to SCI.

The personnel security criteria for access to all SCI are established by the DCI and are promulgated in Director of Central Intelligence Directive 1/14. Comparatively, the criteria for TS clearance require that denial be based upon a well-defined character or personality defect posing a threat to the national security. Because of the vulnerabilities and susceptibilities of SCI programs, special judgments must be made. In effect, no risk is tolerable where SCI is involved, and individuals who have been granted Top Secret clearances may be denied approval for access to SCI. Just as clearance for Top Secret does not automatically guarantee SCI access approval, the denial of SCI approval does not necessarily mean denial or revocation of TS clearance. This reflects the difference in the way SCI security is managed, and that it involves a higher order of security than non-SCI security.

SCI security control systems depend upon distinctive markings and restricted handling of material, stricter personnel security processing for access, and holding SCI material in "control centers" with physical and procedural barriers to preclude access by those who have not been formally approved. The SCI control systems provide an organized program for predetermining a generalized need-to-know regarding specific categories of intelligence and/or sources and methods employed in their collection.

Everyone authorized access to SCI, regardless of that persons' function, receives information that, if revealed to an unauthorized person, can compromise the system and reveal ways of countering it. Because the intelligence inherently is source-revealing, the reader of an SCI intelligence report is just as capable of revealing compromising data about a system as the builder or operator of the system. Material collected by SCI

systems which does not reveal the characteristics and vulnerabilities of the source is considered to be sanitized and is disseminated outside compartmented channels.

In accepting sensitive compartmented information, the recipient accepts the accompanying responsibilities and restrictions in a most explicit way. Each individual approved for access is indoctrinated on the extreme vulnerabilities of the collection systems, the risk to the systems of the unauthorized disclosure of the intelligence they collect, and the rules for safeguarding SCI. As a condition of access, the newly approved individual signs an agreement to abide by the security rules for SCI.

To summarize, the rationale for SCI control systems includes the following concepts:

— Sources and methods producing quantities of high quality intelligence, which are extremely vulnerable to countermeasures, require an extraordinary degree of security protection.

— Extraordinary protection can be afforded by restricting knowledge of these sources and methods and, where necessary, the intelligence they produce, to persons who have been subjected to especially thorough security screening, whose knowledge of such information is required for performance of functions essential to the national security, and who have entered into an agreement requiring that they protect these sources and methods in the manner prescribed by the U.S. Government.

— Because of the extreme vulnerability to countermeasures of the operations covered by SCI control systems, persons granted access to SCI must be determined by thorough investigation to be reliable and trustworthy. The objective of personnel security determinations for SCI access should be

a risk-free population of approved individuals. Therefore, a substantially more vigorous personnel screening process is necessary and a determination standard beyond that for other classified information must be used.

— Especially restricted channels are required for the transmission and use of data revealing the sensitive nature of these sources and methods, and of derived intelligence having the innate capability to compromise such data.

— Regardless of how carefully the security system is structured, the security of our secrets depends, in the final analysis, upon every person granted access. If any of those entrusted with these secrets has vulnerabilities or susceptibilities which may be exploited, then our security can be breached. Every effort must be expended to avoid such an occurrence.

[Caption]

DECLARATION OF LT. GENERAL EDWARD J. HEINZ

I, LT. GENERAL EDWARD J. HEINZ, USAF, declare as follows:

1. I am the Director of the Intelligence Community Staff, which is a staff element of the Director of Central Intelligence (DCI). I have previously executed a declaration in this litigation on 9 February 1988.

2. Pursuant to Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3), and Executive Order 12356, the DCI is responsible for promulgating policies and procedures for the security, use, and dissemination of Sensitive Compartmented Information (SCI) government-wide. SCI, which generally consists of data describing sophisticated technical systems for collecting intelligence and the information collected by those systems, is some of the Nation's most sensitive intelligence information and material and, therefore, it requires special controls for restricted handling within designated compartments. Further information concerning SCI is set forth in the Declaration of DCI Webster dated 1 March 1988.

3. In my capacity as Director of the Intelligence Community Staff, I am responsible for assisting the DCI in establishing security policy with respect to SCI. The DCI has directed that the signing of a DCI-authorized nondisclosure agreement is a condition of access to SCI. On 18 March 1988, the SCI approved the issuance of Form 4355 (attached as Exhibit A) as the new SCI nondisclosure agreement, replacing Form 4193. As directed by the DCI, I notified appropriate senior officials in the Intelligence Community to discontinue use of Form 4193, or equivalent nondisclosure agreements, and to implement the new Form 4355, or an equivalent nondisclosure agreement, in its place. (A copy of my memorandum containing such instructions is attached hereto as exhibit B). It is my understanding that the DCI's

Special Security Center has informed the appropriate nonintelligence agencies of this change. (A copy of one of the notification memoranda is attached hereto as exhibit C).

4. I declare under penalty of perjury that the foregoing is true to the best of my belief.

/s/ Edward J. Heinz
EDWARD J. HEINZ
LT. GENERAL, USAF

Date: 24 March 1988

EXHIBIT A IN SUPPORT OF LT. GENERAL HEINZ'S DECLARATION

SENSITIVE COMPARTMENTED INFORMATION NONDISCLOSURE AGREEMENT

An Agreement Between _____ and the United States

(Name - Printed or Typed)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to information protected within Special Access Programs, hereinafter referred to in this Agreement as Sensitive Compartmented Information (SCI). I have been advised that SCI involves or derives from intelligence sources or methods and is classified or is in the process of a classification under the standards of Executive Order 12356 or other Executive order or statute. I understand and accept that by being granted access to SCI, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of SCI, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information or material have been approved for access to it, and I understand these procedures. I understand that I may be required to sign subsequent agreements upon being granted access to different categories of SCI. I further understand that all my obligations under this Agreement continue to exist whether or not I am required to sign such subsequent agreements.

3. I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of SCI by me could cause irreparable injury to the United States or be used to

advantage by a foreign nation. I hereby agree that I will never divulge anything marked as SCI or that I know to be SCI to anyone who is not authorized to receive it without prior written authorization from the United States Government department or agency (hereinafter Department or Agency) that last authorized my access to SCI. I understand that it is my responsibility to consult with appropriate management authorities in the Department or Agency that last authorized my access to SCI, whether or not I am still employed by or associated with that Department or Agency or a contractor thereof, in order to ensure that I know whether information or material within my knowledge or control that I have reason to believe might by SCI, or related or derived from SCI, is considered by such Department or Agency to be SCI. I further understand that I am also obligated by law and regulation not to disclose any classified information in an unauthorized fashion.

4. In consideration of being granted access to SCI and of being assigned or retained in a position of special confidence and trust requiring access to SCI, I hereby agree to submit for security review by the Department or Agency that last authorized my access to such information or material, any writing or other preparation in any form, including a work of fiction, that contains or purports to contain any SCI or description of activities that produce or relate to SCI or that I have reason to believe are derived from SCI, that I contemplate disclosing to any person not authorized to have access to SCI or that I have prepared for public disclosure. I understand and agree that my obligation to submit such preparations for review applies during the course of my access to SCI and thereafter, and I agree to make any required submissions prior to discussing the preparation with, or showing it to, anyone who is not authorized to have access to SCI. I further agree that I will not disclose the contents of such preparation to any person not authorized to have access to SCI until I have received written authorization from the Department or Agency

that last authorized my access to SCI that such disclosure is permitted.

5. I understand that the purpose of the review described in paragraph 4 is to give the United States a reasonable opportunity to determine whether the preparation submitted pursuant to paragraph 4 sets forth any SCI. I further understand that the Department or Agency to which I have made a submission will act upon them, coordinating within the Intelligence Community when appropriate, and make a response to me within a reasonable time, not to exceed 30 working days from date of receipt.

6. I have been advised that any breach of this Agreement may result in the termination of my access to SCI and removal from a position of special confidence and trust requiring such access, as well as the termination of my employment or other relationships with any Department or Agency that provides me with access to SCI. In addition, I have been advised that any unauthorized disclosure of SCI by me may constitute violations of United States criminal laws, including the provisions of Sections 793, 794, 798 and 952, Title 18, United States Code, and of Section 783(b), Title 50, United States Code. Nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

7. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement. I have been advised that the action can be brought against me in any of the several appropriate United States District Courts where the United States Government may elect to file the action. Court costs and reasonable attorneys fees incurred by the United States Government may be assessed against me if I lose such action.

8. I understand that all information to which I may obtain access by signing this Agreement is now and will forever remain the property of the United States Government unless and until otherwise determined by an appropriate official or final ruling of a court of law. Subject to such determination, I do not now, nor will I ever, possess any right, interest, title, or claim whatsoever to such information. I agree that I shall return all materials, which may have come into my possession or for which I am responsible because of such access, upon demand by an authorized representative of the United States Government or upon the conclusion of my employment or other relationship with the United States Government entity providing me access to such materials. If I do not return such materials upon request, I understand this may be a violation of Section 793, Title 18, United States Code.

9. Unless and until I am released in writing by an authorized representative of the Department or Agency that last provided me with access to SCI, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to SCI, and at all times thereafter.

10. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect. This Agreement concerns SCI and does not set forth such other conditions and obligations not related to SCI as may now or hereafter pertain to my employment by or assignment or relationship with the Department or Agency.

11. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available Sections 793, 794, 798, and 952 of Title 18, United States Code, and Section 783(b) of Title 50, United States Code, and Executive Order 12356, as

amended, so that I may read them at this time, if I so choose.

FORM 4355
3/88

(Replaces Form 4193 which is obsolete and will not be used)

Pl. Exhibit 16

THE WHITE HOUSE
Washington

RECEIVED
MAR 1988
HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

March 8, 1988

Dear Chairman Brooks:

On February 9, you inquired about the National Security Council (NSC) staff's practices under Section 630 of Public Law 100-202, the Continuing Resolution for Fiscal Year 1988, which placed certain restrictions on the use of nondisclosure forms.

After December 22, 1987, and consistent with guidance from the Information Security Oversight Office (see Tab A), the NSC staff ceased using Standard Form 189, "Classified Information Nondisclosure Agreement," and Standard Form 189-A, "Classified Information Nondisclosure Agreement (Industrial/Commercial/Non- Government)."

After December 22, 1987, and consistent with guidance from the Central Intelligence Agency (see Tab B), the NSC staff continued to use Form 4193 together with the following addendum:

> The obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with the section entitled "Employee Disclosure Agreements" contained in P.L. 100-202, Continuing Appropriations for Fiscal Year 1988, 22 December 1987, and other applicable law.

The NSC staff also has continued to use a third nondisclosure form (based on Form 4193) for NSC special access programs (see Tab C). In response to the Continuing Resolution, this form was modified: the words "classifiable under" were replaced with "otherwise meets." We believe that this change fully complies with the Continuing Resolution. In order to eliminate any possible misunderstanding, however, we recently further modified the form by replacing the words "classified or classifiable" with language tracking Section 630: "marked as classified, unmarked but which I know to be classified, or unclassified which I know to be in the process of a classification determination" (see Tab D). The NSC staff now uses this version of the form.

Sincerely,

/s/ Colin L. Powell

[Attachments]

The Honorable Jack Brooks
Chairman, Committee on Government Operations
U.S. House of Representatives
Washington, D.C. 20515

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, *Plaintiff,*	)	Civil Action No. 87-2284-OG
v.	)	
UNITED STATES OF AMERICA, *et al.*, *Defendants.*	)	**FILED JUL 29, 1988 Clerk, U.S. District Court District of Columbia**
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*, *Plaintiffs,*	)	Civil Action No. 87-2412-OG
v.	)	
STEVEN GARFINKEL, *et al.*, *Defendants.*	)	

FINAL JUDGMENT AND ORDER

Upon consideration of defendants' Motion to Dismiss and plaintiffs' Motions for Summary Judgment, the oppositions thereto, and the record herein, and for the reasons stated in the accompanying memorandum, it is by the Court this *28th* day of July, 1988

ORDERED that defendants' Motion to Dismiss be, and hereby is, granted as to counts V and VII in Civil Action No. 87-2412 and denied as to the remaining counts; and it is further

ORDERED that plaintiffs' Motions for Summary Judgment be, and hereby are, granted, in part, as to count II in Civil Action No. 87-2284 and as to counts I and II in Civil Action

No. 872412, and denied as to all remaining counts; and it is further

ADJUDGED AND DETERMINED that use of the term "classifiable" in SF 189, SF 4193, DD 1847-1, or any other nondisclosure agreement is unconstitutional unless the form includes or is accompanied by the definition of "classifiable" that appears in 32 C.F.R. § 2003.20(h)(1); and it is further

ADJUDGED AND DETERMINED that an agreement includes or is accompanied by the definition of "classifiable" that appears in 32 C.F.R. § 2003.20(h)(1) if this section of the C.F.R. is reprinted and:

(1) Presented to the employee at the time the agreement is executed; or

(2) Delivered within sixty (60) days of the date of this Order to the employee who has already signed the agreement; and it is further

ORDERED that until the employee receives a copy of the definition of "classifiable," the nondisclosure agreement may not be enforced to penalize the employee for disclosure of "classifiable" information; and it is further

ORDERED that in lieu of delivery or presentment of the definition of "classifiable," the Information Security Oversight Office, the Director of Central Intelligence, the Department of Defense, and any other agency that has used a nondisclosure agreement containing the word "classifiable" may notify every employee that has signed such an agreement that "classifiable" is stricken from the agreement and that liability shall not arise under the agreement for disclosure of "classifiable" information; and it is further

ORDERED that within sixty (60) days of the date of this Order each employee that has signed a nondisclosure agreement containing the word "classifiable" shall receive a copy of the definition of "classifiable" that appears in 32 C.F.R. § 2003.20(h)(1) or notice that the word is stricken from the agreement and shall not be a basis for liability.

/s/ **Oliver Gasch**

United States District Judge
Oliver Gasch

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, *Plaintiff,*	)	Civil Action No. 87-2284-OG
v.	)	
UNITED STATES OF AMERICA, *et al.*, *Defendants.*	)	**FILED SEP 26, 1988 Clerk, U.S. District Court District of Columbia**
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*, *Plaintiffs,*	)	Civil Action No. 87-2412OG
v.	)	
STEVEN GARFINKEL, *et al.*, *Defendants.*	)	

ORDER

Upon consideration of the defendants' motion to alter or amend judgment, the oppositions thereto, and the record herein, and it appearing from the representations of government counsel in open court that the word "classifiable" has been deleted in some instances and other words substituted therefor; and it further appearing that to the extent that "classifiable" is still deemed binding on certain government employees, that those who are deemed bound by the non-disclosure agreement be given actual notice as hereinafter provided, it is by the Court this *25th* day of September, 1988,

ORDERED, that defendants' motion be, and hereby is, granted in part and denied in part; and it is further

ORDERED that the defendants are granted an additional thirty (30) days within which to comply with this Court's Order of July 29, 1988, so that within ninety (90) days of the date of the Court's original Order, each employee who has signed a nondisclosure agreement containing the word "classifiable" shall either receive a copy of the definition of "classifiable" as the same appears in 32 C.F.R. § 2003.20(h)(1) or notice that the word has been stricken from the agreement and what, if any, words have been substituted in lieu thereof.

/s/ **Oliver Gasch**

Judge

CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT

An Agreement Between _____ and the United States
(Name - Printed or Typed)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to classified information. As used in this Agreement, classified information is marked or unmarked classified information, including oral communications, that is classified under the standards of Executive Order 12356, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security; and unclassified information that meets the standards for classification and is in the process of a classification determination as provided in Sections 1.1(c) and 1.2(e) of Executive Order 12356, or under any other Executive order or statute that requires protection for such information in the interest of national security. I understand and accept that by being granted access to classified information, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of classified information, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and that I understand these procedures.

3. I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause damage or irreparable injury to the United States or could be used to advantage by a foreign nation. I hereby agree that I will never divulge such classified informa-

tion to anyone unless: (a) I have officially verified that the recipient has been properly authorized by the United States Government to receive it; or (b) have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) responsible for the classification of the information or last granting me a security clearance that such disclosure is permitted. I understand that if I am uncertain about the classification status of information, I am required to confirm from an authorized official that the information is unclassified before I may disclose it, except to a person as provided in (a) or (b), above. I further understand that I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information.

4. I have been advised that any breach of this Agreement may result in the termination of any security clearances I hold; removal from any position of special confidence and trust requiring such clearances; or the termination of my employment or other relationships with the Departments or Agencies that granted my security clearance or clearances. In addition, I have been advised that any unauthorized disclosure of classified information by me may constitute a violation or violations of United States criminal laws, including the provisions of Sections 641, 793, 794, 798, and *952, Title 18, United States Code, *the provisions of Section 783(b), Title 50, United States Code, and the provisions of the Intelligence Identities Protection Act of 1982. I recognize that nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

5. I hereby assign to the United States Government all royalties, remunerations, and emoluments that have resulted, will result or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreement.

6. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement.

7. I understand that all information to which I may obtain access by signing this Agreement is now and will forever remain the property of, or under the control of the United States Government unless and until otherwise determined by an authorized official or final ruling of a court of law. I do not now, nor will I ever, possess any right, interest, title, or claim whatsoever to such information. I agree that I shall return all materials which have, or may have, come into my possession or for which I am responsible because of such access: (a) upon demand by an authorized representative of the United States Government; (b) upon the conclusion of my employment or other relationship with the Department or Agency that last granted me a security clearance or that provided me access to classified information; or (c) upon the conclusion of my employment or other relationship that requires access to classified information. If I do not return such materials upon request, I understand that this may be a violation of Section 793, Title 18, United States Code, a United States criminal law.

8. Unless and until I am released in writing by an authorized representative of the United States Government, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to classified information, and at all times thereafter.

9. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect.

10. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available to me Sections 641, 793, 794, 798 and *952 of Title 18, United States Code, *Section 783(b) of Title 50, United States Code, the Intelligence Identities Protection Act of 1982, Executive Order 12356 or its successor, and Section 2003.20, Title 32, Code of Federal Regulations, so that I may read them at this time, if I so choose.

SIGNATURE	DATE	SOCIAL SECURITY NO. (See notice below)

ORGANIZATION (IF CONTRACTOR, LICENSEE OR AGENT, PROVIDE: NAME, ADDRESS AND, IF APPLICABLE FEDERAL SUPPLY CODE NUMBER) (Type or print)

WITNESS

THE EXECUTION OF THIS AGREEMENT WITNESSED BY THE UNDERSIGNED.

SIGNATURE	DATE

NAME AND ADDRESS (Type or print)

ACCEPTANCE

THE UNDERSIGNED ACCEPTED THIS AGREEMENT ON BEHALF OF THE UNITED STATES GOVERNMENT

SIGNATURE	DATE

NAME AND ADDRESS (Type or print)

SECURITY DEBRIEFING ACKNOWLEDGMENT

I reaffirm that the provisions of the espionage laws, other federal criminal laws and executive orders applicable to the safeguarding of classified information have been made available to me; that I have returned all classified information in my custody; that I will not communicate or transmit classified information to any unauthorized person or organization; that I will promptly report to the Federal Bureau of Investigation any attempt by an unauthorized person to solicit classified information, and that I (have) (have not) (strike out inappropriate word or words) received a security debriefing.

SIGNATURE OF EMPLOYEE	DATE

NAME OF WITNESS (Type or print)	SIGNATURE OF WITNESS

NOTICE: The Privacy Act, 5 U.S.C. 552a, requires that all federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Account Number (SSN) is Executive Order 9397. Your SSN will be used to identify you precisely when it is necessary to 1) certify that you have access to the information indicated above, 2) determine that your access to the information indicated has terminated, or 3) certify that you have witnessed a briefing or debriefing. Although disclosure of your SSN is not mandatory, your failure to do so may impede such certifications or determinations, or possibly result in the denial of your being granted access to classified information.

*NOT APPLICABLE TO NON-GOVERNMENT PERSONNEL SIGNING THIS AGREEMENT

STANDARD FORM 312 (9/88)
Prescribed by GSA/ISOO
32 CFR 2003:E.O. 12356

No. 87-2127 (5)

Supreme Court, U.S.
FILED
DEC 29 1988
JOSEPH E. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION,
et al., Appellants,

v.

STEVEN GARFINKEL,
et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANTS

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45 pp

QUESTION PRESENTED

Did the district court err in declaring Section 630 of the Continuing Resolution for Fiscal Year 1988 unconstitutional under the doctrine of separation of powers on the ground that Congress has no authority to enact legislation that regulates the disclosure of national security information?

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*The plaintiffs in the district court (appellants in this Court) were the American Foreign Service Association, Representative Barbara Boxer, Representative Jack Brooks, Senator Charles Grassley, Senator David Pryor, Representative Pat Schroeder, Representative Gerry Sikorski, and Senator William Proxmire (whose term will expire in January 1989). The defendants below (appellees here) were Steven Garfinkel, Director of the Information Security Oversight Office, William H. Webster, Director of Central Intelligence, and George P. Shultz, Secretary of State.

In the district court, this case was consolidated with *National Federation of Federal Employees v. United States, Terence C. Golden, Steven Garfinkel, Frank Carlucci, John O. Marsh, Jr., Edward C. Aldridge, Jr., and James H. Webb, Jr.*, No. 87-2284-OG, and with *American Federation of Government Employees, AFL-CIO, Jim Stinchcomb, James Douglas and Louis C. Brase v. Steven Garfinkel, Terence C. Golden, Colin L. Powell, William Webster, Frank Carlucci, Edward C. Aldridge, John O. Marsh, Jr., James H. Webb, Jr., and United States*, No. 87-2412-OG. Those cases presented claims that were not finally disposed of until the district court's subsequent orders filed July 29, 1988 and September 26, 1988, and are currently on appeal to the United States Court of Appeals for the District of Columbia Circuit (appeals docketed, Nos. 88-5402 & 88-5404 (Nov. 17 & 22, 1988)).

TABLE OF CONTENTS

Page:

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINION AND ORDER BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. The Nondisclosure Agreement Program 2

B. Response of Congress and Federal Employees to the New Nondisclosure Forms 5

C. Section 630 and Appellees' Noncompliance With It 9

D. This Lawsuit 12

E. Post-Decision Developments: Rulings in the Companion Cases and Renewal of Section 630 14

SUMMARY OF ARGUMENT 17

ARGUMENT 18

THE DISTRICT COURT ERRONEOUSLY HELD THAT SECTION 630 IS UNCONSTITUTIONAL IN EVERY CONCEIVABLE APPLICATION 18

A. Appellees Have Not Complied With Section 630 18

B. The District Court's Decision Seriously Misstates the National Security Powers of Congress and the Executive Branch 20

1. Congress Has Extensive Powers That Enable It To Regulate National Security Information 22

2. The Executive Branch's National Security Powers, Though Important, Are Limited By Both The Constitution And Actions Of Congress Pursuant To Its Constitutional Powers 25

C. Section 630 Does Not Prevent the Executive Branch From Carrying Out its Constitutional Functions 30

1. Section 630's Limits On The Information That May Be Covered By Nondisclosure Agreements Do Not Disrupt The Executive Branch 31

2. Section 630's Protections of Disclosures to Congress Do Not Violate the Doctrine of Separation of Powers 38

CONCLUSION 48

TABLE OF AUTHORITIES

Cases: **Page:**

Alfred A. Knopf, Inc. v. Colby,
509 F.2d 1362 (4th Cir.), *cert. denied*,
421 U.S. 992 (1975) 35

American Federation of Government Employees, AFL-CIO v. Garfinkel, No. 87-2412-OG
(D.C. July 29, 1988 & Sept. 26, 1988)
(appeal docketed No. 88-5402 (D.C. Cir.
Nov 17, 1988)) ..... i, 6, 14, 15

Barenblatt v. United States,
360 U.S. 109 (1959) 42, 47

Bowen v. Kendrick,
108 S. Ct. 2562 (1988) 21

Bowsher v. Synar,
478 U.S. 714 (1986) 14

Brown v. Glines,
444 U.S. 348 (1980) 41, 46

Brown v. United States,
12 U.S. (8 Cranch) 109 (1814) 29

Buckley v. Valeo,
424 U.S. 1 (1976) 25

Bush v. Lucas,
462 U.S. 367 (1983) 24, 41

Carlucci v. Doe,
57 U.S.L.W. 4025 (U.S. Dec. 6, 1988)
(No. 87-751) 24

Cole v. Young,
351 U.S. 536 (1956) 24

Commodity Futures Trading Commission v. Schor,
478 U.S. 833 (1986) 21, 22

Dames & Moore v. Regan,
453 U.S. 654 (1981) 28

Department of the Navy v. Egan,
108 S. Ct. 818 (1988) 24

Eastland v. United States Servicemen's Fund,
421 U.S. 491 (1975) 42

EPA v. Mink,
410 U.S. 73 (1973) 24

Ex Parte Garland,
71 U.S. 366 (1867) 25

Garner v. Louisiana,
368 U.S. 157 (1945) 21

Haig v. Agee,
453 U.S. 280 (1981) 28

In re Chapman,
166 U.S. 661 (1896) 44

Kent v. Dulles,
357 U.S. 116 (1958) 32, 33

Little v. Barreme,
6 U.S. (2 Cranch) 170 (1804) 29

McGehee v. CIA,
718 F.2d 1137 (D.C. Cir. 1983) 35

McGrain v. Daugherty,
273 U.S. 135 (1927) 42, 44

Morrison v. Olson,
108 S. Ct. 2597 (1988) 21

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 46

National Federation of Federal Employees v. United States, No. 87-2284-OG (D.D.C. July 29, 1988 & Sept. 26, 1988) (appeal docketed, No. 88-5404 (D.C. Cir. Nov. 22, 1988)) ..... i, 6, 14, 15

New York Times Co. v. United States,
403 U.S. 713 (1971) (per curiam) 28, 29

Nixon v. Administrator of General Services,
433 U.S. 425 (1977) ..... *passim*

Regan v. Wald,
468 U.S. 222 (1984) 28

Sinclair v. United States,
279 U.S. 263 (1929) 44

Snepp v. United States,
444 U.S. 507 (1980) (per curiam) 33

Talley v. California,
362 U.S. 60 (1960) 46

United States v. AT&T,
551 F.2d 384 (D.C. Cir. 1976) 47

United States v. AT&T,
567 F.2d 121 (D.C. Cir. 1977) 48

United States v. Butler,
297 U.S. 1 (1935) 23

United States v. Curtiss-Wright Export Corp.,
299 U.S. 304 (1936) 25, 26

United States v. Munsingwear,
340 U.S. 36 (1940) 20

United States v. Nixon,
418 U.S. 683 (1974) 21

United States v. Robel,
389 U.S. 258 (1967) 32

Watkins v. United States,
354 U.S. 178 (1957) 42

Webster v. Doe,
108 S. Ct. 2047 (1988) 24

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 26-30

Zemel v. Rusk,
381 U.S. 1 (1965) 28

Constitutional Provisions:

United States Constitution
Article I, § 1 23
Article I, § 2, cl. 5 23
Article I, § 3, cl. 6 23
Article I, § 8, cl. 1 ..... 22, 23
Article I, § 8, cls. 3-5 23
Article I, § 8, cls. 10-18 ..... 22, 23
Article I, § 9, cl. 7 23
Article II, § 2, cl. 1 25
Article II, § 2, cl. 2 ..... 23, 25

Statutes:

2 U.S.C. § 192 44
5 U.S.C. § 7211 ..... 40, 41, 46
10 U.S.C. § 1034 ..... 41, 46, 47
18 U.S.C. § 798(b) 34
18 U.S.C. § 1505 44
28 U.S.C. § 1252 1
28 U.S.C. § 1331 12

Civil Service Reform Act of 1978,
5 U.S.C. § 1206(b)(1) 46
5 U.S.C. § 2302 ..... 24, 33
5 U.S.C. § 2302(b) 32
5 U.S.C. § 2302(b)(8) 8
5 U.S.C. § 2302(b)(8)(A) 31
5 U.S.C. § 2303 24

Classified Information Procedures Act,
18 U.S.C. App. §§ 1-16 22

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2127

AMERICAN FOREIGN SERVICE ASSOCIATION,
et al., Appellants,

v.

STEVEN GARFINKEL,
et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANTS

OPINION AND ORDER BELOW

The opinion and order of the United States District Court for the District of Columbia are officially reported at 688 F. Supp. 671 (D.D.C. 1988), and are reproduced in the appendix to the jurisdictional statement (App. 1a-38a).

JURISDICTION OF THIS COURT

This is an appeal from a final order of the United States District Court for the District of Columbia, entered on May 27, 1988, holding an Act of Congress unconstitutional and dismissing the complaint. App. 37a-38a. A notice of appeal was filed on June 3, 1988. App. 39a-41a. Because the district court declared an Act of Congress unconstitutional in a civil action to which officers of the United States were parties, this Court has jurisdiction under 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 630 of the Continuing Resolution for Fiscal Year

1988, Pub. L. No. 100-202, 101 Stat. 1329-432 (Dec. 22, 1987), and the relevant constitutional provisions are set forth in appellants' jurisdictional statement. Section 619 of the Treasury, Postal Service and General Government Appropriations Act of 1989, Pub. L. No. 100-440, 102 Stat. 1721, 1756 (Sept. 22, 1988), which is identical to Section 630, is set forth in an addendum to this brief.

STATEMENT OF THE CASE

This appeal seeks reversal of a ruling that Congress violated the doctrine of separation of powers when it enacted a law limiting the use of certain terms in nondisclosure forms that Executive Branch employees are required to sign as a condition of obtaining access to classified information. In order to understand why that broad ruling of unconstitutionality cannot stand, it is necessary to review the nondisclosure agreement program that led to the passage of the statute, Congress' attempts to work out an accommodation with the Administration, the Executive Branch's violation of the statute, and the breadth of the claims raised by appellees and accepted by the district court.

A. The Nondisclosure Agreement Program.

In March 1983, adhering to the recommendations of an Executive Branch task force, President Reagan expanded the group of federal employees who must sign nondisclosure agreements, which generally forbid unauthorized disclosures of classified information, from only those in particularly sensitive positions to all individuals who are authorized to have access to any classified information. National Security Decision Directive-84 ("NSDD-84") ¶ 1(a) (Joint Appendix ("J.A.") 11).[1] He

[1]The task force's recommendations are contained in *Report of the Interdepartmental Group on Unauthorized Disclosures of Classified Information* (Mar. 31, 1982), which is reprinted in *Presidential Directive on the Use of Polygraphs & Prepublication Review: Hearings Before the Subcomm. on Civil & Constitutional Rights of the House Judiciary Comm.*, Serial No. 114, 98th Cong., 1st & 2d Sess. 166, 169 (1983 & 1984) ("1983-1984 House Judiciary Comm. Hearing").

also directed all employees who have access to Sensitive Compartmented Information ("SCI") — the portion of classified information that involves or is derived from intelligence sources and methods — to sign nondisclosure agreements providing for prepublication review. J.A. 11-12. This obligation, which requires employees to submit writings related to classified information or intelligence activities for review prior to publication to ensure deletion of classified material, had previously applied only to employees of the intelligence-gathering agencies, such as the Central Intelligence Agency and the National Security Agency. *National Security Decision Directive 84: Hearing before the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. 20 (1983) ("1983 Senate Hearing") (Sen. Eagleton).

To carry out this directive, appellee Steven Garfinkel, the Director of the Information Security Oversight Office ("ISOO"), developed Standard Form 189 ("SF 189") and required federal employees who have access to classified, but not SCI, information, to sign it. 32 C.F.R. § 2003.20(b) (1987); J.A. 15-18. Similarly, the predecessor of appellee William Webster, the Director of Central Intelligence, who is responsible for protecting intelligence sources and methods under the National Security Act of 1947, 50 U.S.C. § 403(d)(3), implemented the directive by requiring federal employees who have access to SCI to sign a revised version of Standard Form 4193 ("SF 4193"). J.A. 19-25.

Although NSDD-84 and the Executive Branch task force that recommended these measures were concerned only with classified information, both SF 189 and SF 4193 forbid federal employees from divulging both classified and "classifiable" information to individuals who are not authorized to receive them. *Compare* J.A. 11-14 *and* 1983-1984 House Judiciary Comm. Hearings at 166-80 *with* J.A. 15, 19. The forms contain no definition of the term "classifiable," nor is the term defined in Executive Order 12,356, which sets forth the standards and

procedures governing the classification of information held by the Executive Branch, and which requires classified information to be marked with classification designations. Exec. Order 12,356, §§ 1.5, 6.1(c) (April 2, 1982), 50 U.S.C.A. § 401 note.[2]

In addition, while the forms are not explicit on the issue, the Administration has taken the position that employees who sign these forms agree not to disclose classified or "classifiable" information to Congress without prior authorization, even if the employee is otherwise entitled to give the information to Congress. Appellees' Motion to Affirm at 15, 22, 23 n.22, 24, 26-27; J.A. 37; 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987) (Rep. Brooks). In other words, Executive Branch employees are forbidden from providing information to Members of Congress until their superiors decide that the Member in question has a need to know the information, even though previously Members of Congress were deemed to be authorized to receive classified information. Like the term "classifiable," this interpretation has no basis in NSDD-84, which makes no mention of congressional disclosures, J.A. 11-14, or in Executive Order 12,356, which requires only that, where classified information is disseminated outside the Executive Branch, it shall be done under conditions that ensure that it will be given equivalent protection. Exec. Order 12,356, § 4.1(c).

Employees who decline to sign these secrecy forms or who violate their terms risk losing their security clearances and, in many cases, their jobs, which require such clearances, even if their actions do not violate Executive Order 12,356, or are otherwise authorized by law. J.A. 16, 21. As of December 31, 1987, about 2.5 million current and former government employees had signed SF 189, and about 453,000 current and former employees, excluding CIA and NSA employees, had signed SF

[2]Documents awaiting a classification determination may be treated as though they are classified for a thirty day period while they are undergoing review, Exec. Order. 12,356, §§ 1.1 (c) and 1.2(e), and it is common practice to mark such documents with an interim classification designation.

4193 or its equivalent. *Congress & the Administration's Secrecy Pledges: Hearing Before a Subcomm. of the House Comm. on Gov't Operations,* 100th Cong., 2d Sess. 156-66, 170-71, 187 (1988) ("1988 Hearing") (General Accounting Office testimony). Thus, approximately three million individuals, or more than one half of the combined federal civilian and military workforce, are bound by these forms. *Id.*; General Accounting Office, *Information & Personnel Security: Data on Employees Affected by Federal Security Programs* 10 (Sept. 1986) ("1986 GAO Report").

B. Response of Congress and Federal Employees to the New Nondisclosure Forms.

From their inception, the new nondisclosure forms have been the subject of extensive criticism and scrutiny by Congress. Thus, in 1983-1984, Congress condemned the expansion of prepublication review clauses beyond the intelligence-gathering agencies in several hearings, committee reports, a rider cutting off funds for implementation of the program for five months, and a bill approved by two House committees which would have permanently limited such agreements.[3] Shortly after the Executive Branch released its revised SCI agreement in August 1983, several Senators assailed the vagueness of the terms "classifiable" and "subject to classification," on the ground that employees could not know whether particular information came within such broad terms. 1983 Senate Hearing at 13-14, 20, 39-40 (Sen.

[3]*See Review of the President's National Security Decision Directive 84 & the Proposed Department of Defense Directive on Polygraph Use: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 98th Cong., 1st Sess. (1983); 1983 Senate Hearing, *supra* at 3; 1983-1984 House Judiciary Comm. Hearing, *supra* at 2 n. 1; Comm. on Gov't Operations, *The Administration's Initiatives to Expand Polygraph Use & Impose Lifelong Censorship on Thousands of Government Employees*, H.R. Rep. No. 578, 98th Cong., 1st Sess. 20-21 (1983) ("1983 House Report"); H.R. Rep. No. 961, 98th Cong., 2d Sess. (1984) ("1984 House Report"); Department of State Authorization Act for Fiscal Years 1984 & 1985, Pub. L. No. 98-164, § 1010, 97 Stat. 1017, 1061 (1983); H.R. 4681, 98th Cong., 2d Sess. (1984), *in* 1984 House Report at 1-4.

Eagleton); *id.* at 16-17 (Sen. Levin). In the face of this legislative opposition, the Administration agreed to suspend the portion of NSDD-84 that requires all employees with access to SCI to sign prepublication review forms for the remainder of the 1984 session in order to enable Congress and the Executive Branch to work together to devise a means to prevent unauthorized disclosures of classified information. 1984 House Report at 55-56. After the end of that session, however, the Administration again required all employees outside the CIA and NSA who have access to SCI to sign SF 4193, which requires prepublication review. House Comm. on Government Operations, *Legislation Needed to Curb Secrecy Contracts*, H.R. Rep. No. 911, 100th Cong., 2d Sess. 5 (1988) ("1988 House Report"); 1986 GAO Report at 2.

Many employees refused to sign the standard forms because the term "classifiable" is so broad and vague. After many such refusals and numerous complaints from Members of Congress, appellee Garfinkel published two clarifications in the Federal Register, which limited that term in SF 189, but in no other forms, to information that meets the requirements for classification set forth in Executive Order 12,356, but has no classification markings as a result of time constraints, negligence, error, lack of opportunity, or oversight. 52 Fed. Reg. 28,802 (Aug. 3, 1987) & 52 Fed. Reg. 29,793 (Aug. 11, 1987). Because many federal employees were still concerned that they would be unable to determine with any degree of certainty whether particular information is covered by their nondisclosure agreements, several employees and their union representatives filed two separate lawsuits challenging the standard forms, primarily on vagueness grounds. *National Federation of Federal Employees v. United States*, No. 87-2284-OG (D.D.C., filed August 17, 1987); *American Federation of Government Employees, AFL-CIO v. Garfinkel*, No. 87- 2412-OG (D.D.C., filed September 1, 1987). Subsequently, at an October 1987 hearing of the House Subcom-

mittee on Human Resources, appellee Garfinkel further defined "classifiable" as information that the employee knows or reasonably should know is "unmarked information that already is classified, or meets the standards for classification and is in the process of being classified." *Classified Information Nondisclosure Agreements: Hearing Before Subcomm. on Human Resources of the House Comm. on Post Office & Civil Service*, Serial No. 100-37, 100th Cong., 1st Sess. 78-79 (1987) ("1987 Hearing").

Even with this last modification, appellee Garfinkel's clarifications did not allay congressional concerns, as Representative Gerry Sikorski made clear at the beginning of that hearing:

> Despite the recent regulations issued by the ISOO and the various sometimes inconsistent versions or definitions that Mr. Garfinkel of the ISOO has propounded in letters to this committee and to others in Congress, the definition of "classifiable" is still threateningly vague and all-encompassing.
>
> Employees must speculate about what information may or may not be classified. Classifiable still can be, as Mr. Garfinkel once honestly declared, just about anything.

Id. at 1-2. Senator Charles Grassley highlighted the flaws in the use of these terms:

> How does one then know when information is classified? The answer is that it is marked "classified."
>
> How does one know when something is classifiable? The answer is that one cannot know. The term is so broad and undefinable that it could supplant the term "loitering" as a textbook example of vagueness for first year law school classes.

Id. at 9. Thus, according to Representative Sikorski:

> Federal employees place their jobs on the line whenever they release *any* information — whether or not it was actually marked classified at the time of the release. They risk civil and criminal sanctions against them. The chilling effect is obvious as a Minnesota January.

Id. at 5 (emphasis in original); *id.* at 22 (Rep. Brooks) ("anything that somebody said they do not like would be 'classifiable'").

Representative Barbara Boxer also cautioned that the term "classifiable" allows retroactive classification after information has been disclosed in order to punish whistleblowers for making disclosures that embarrass their superiors. *Id.* at 14; J.A. 34. Senator Grassley echoed the concerns raised in an opinion of the Congressional Research Service that the standard forms are "a back-door way of going beyond the laws passed by Congress," particularly the whistleblower protection provisions of the Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(8). 1987 Hearing at 9-10, 157-64. Finally, several Members protested the applicability of the forms' prior authorization requirement to congressional disclosures because it deters disclosures of both classified and "classifiable" information that Congress needs to perform its duties, but which executive officials may prefer to keep hidden. *Id.* at 14 (Rep. Boxer); *id.* at 16 (Rep. Sikorski); J.A. 34, 35 (Rep. Boxer); *id.* at 37 (Sen. Grassley).[4]

After negotiations between Congress and the Executive Branch broke down, Senator Grassley characterized the forms as an attempt by the Administration "to go way beyond the legitimate protection of classified information . . . to place a blanket of

[4]Not only does the Executive Branch require prior authorization before employees disclose information to Congress, but some Executive Branch officials have asked Members of Congress to sign SF 189 before receiving classified documents, including in one instance where the document was prepared by the General Accounting Office, an arm of Congress. *Id.* at 22-25 (Rep. Brooks); *id.* at 13 (Rep. Boxer); J.A. 36.

silence over all information generated by the government . . . [which] begs to be addressed immediately by the Congress." *Id.* at 8; *see also id.* at 10; J.A. 37. Thus, in order to facilitate more productive negotiations or the passage of permanent legislation, he urged Congress to pass a law outlawing the use of the current forms. 1987 Hearing at 10, 12.

C. Section 630 and Appellees' Noncompliance With It.

In the wake of the failed negotiations, Congress passed a law, which became effective on December 22, 1987, barring the use of funds during Fiscal Year 1988 to implement the existing forms or to enforce certain of their provisions. Section 630, Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987). The pertinent provision, Section 630, prohibits the Executive Branch from spending any funds during Fiscal Year 1988 to implement, *i.e.*, have employees sign, SF 189 and SF 4193, or other nondisclosure agreements that violate any of five discrete prohibitions or to enforce during that year any such provisions contained in agreements previously signed.

The first two subsections of Section 630 forbid the use of the term "classifiable" and restrict nondisclosure agreements to information that is specifically marked classified or that the employee *knows* is either classified or in the process of a classification determination. The next two subsections provide that nondisclosure agreements may not, by a requirement of prior written authorization or otherwise, obstruct the right of any individual to petition or communicate with Members of Congress in a secure manner, as provided by the rules and procedures of Congress, or limit the right of Congress to obtain Executive Branch information under such rules and procedures. The final subsection, which overlaps to a considerable degree with Section 630's other provisions, forbids nondisclosure agreements from imposing obligations or invoking remedies that are inconsistent with statutory law, such as whistleblower protections.

However, Section 630 expressly allows enforcement of those aspects of nondisclosure agreements that do not fall within any of its specific prohibitions.

According to the Conference Report, Section 630's purpose "is to address serious concerns of the Congress about the obligations imposed on government employees by nondisclosure agreements . . .." H. Conf. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987). In particular:

> These agreements, which are imposed by the executive branch without any explicit statutory authority, create obligations for these employees to safeguard not only information which is properly classified pursuant to executive order, but any information which may be considered to be "classifiable." This overbroad and ambiguous language results in a chilling effect on the first amendment rights of government employees, including their ability to communicate directly with members of Congress.

Id. The moratorium imposed by Section 630 was intended to enable Congress "to examine the entire issue of nondisclosure agreements, including prepublication review, and make appropriate responses to executive branch policy in this area as needed." *Id.*; 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987) (floor statement of Rep. Brooks) ("This provision places a moratorium on the administration's use of various nondisclosure agreements for a year so that Congress may review them").

Although the President signed the Continuing Resolution without noting any objection to Section 630, the Executive Branch did not comply with it. Despite the fact that appellee Garfinkel directed agencies to cease requiring employees to sign SF 189 agreements until further notice, J.A. 28-29, 30, at least 43,000 SF 189 agreements were executed between December 22, 1987 and March 31, 1988. 1988 Hearing at 166, 173, 188

(GAO Testimony). Recognizing that agencies had violated Section 630's implementation ban, appellee Garfinkel directed them to take reasonable steps to notify employees that SF 189 agreements signed after December 22, 1987 are voidable at the employee's request. J.A. 29, 32. However, because he did not require agencies to void post-December 22 agreements in the absence of a request from the employee, employees had to take affirmative steps identifying themselves to their superiors in order to obtain the benefits of Section 630. J.A. 29, 32-33. Nor did he require agencies to notify those who had signed agreements before December 22, 1987 that Section 630 significantly altered the effect of those agreements. J.A. 28-33.

Appellee Webster, who had never adopted any limiting definitions of the term "classifiable," did even less to comply with Section 630. Thus, he instructed agencies to continue using SF 4193 and other forms that contain the provisions banned by Section 630, and merely to attach an addendum that consists solely of the following sentence:

> The obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with the section entitled "Employee Disclosure Agreements" contained in P.L. 100-202, Continuing Appropriations for Fiscal Year 1988, 22 December 1987, and other applicable law.

J.A. 26-27. The addendum does not identify the section of the Continuing Resolution setting forth the restrictions, despite the fact that Section 630 occupies less than one page of a 450-page bill that has no index to assist in locating a section on a particular subject matter. Pub. L. No. 100-202, 101 Stat. 1329. As a result, approximately 5000 employees signed SF 4193 or its equivalent during the Section 630 ban, with only the addendum giving them any hint that it might be less than fully enforceable. 1988 Hearing

at 166, 173, 188 (GAO Testimony).

D. This Lawsuit.

On February 18, 1988, appellant American Foreign Service Association ("AFSA"), a professional and labor association of foreign service employees whose members have been required to sign SF 189 and SF 4193 both before and after December 22, 1987, and seven Members of Congress, who depend on access to national security information furnished by federal employees in order to carry out their duties (the "congressional appellants"), filed this lawsuit in the United States District Court for the District of Columbia to compel appellees Garfinkel, Webster, and Secretary of State George P. Shultz to comply with Section 630. J.A. 5. Jurisdiction was based on 28 U.S.C. § 1331, and the case was assigned to the same judge who was hearing the earlier cases, in which the congressional appellants had filed an *amicus* brief. Appellants sought a preliminary injunction to prevent appellees from requiring federal employees to sign the prohibited non-disclosure agreements during the remainder of Fiscal Year 1988. J.A. 1, 10. They also asked the court to require appellees to treat all agreements signed on or after December 22, 1987 as void and to notify the employees who signed such agreements that they are unenforceable. J.A. 10. Subsequently, in order to remove the chill imposed by the unenforceable portions of the pre-December 22 agreements, appellants asked the court to require that all federal employees who signed the forms before December 22, 1987 be notified that the terms listed in Section 630 could not be enforced during the funding ban. J.A. 3, 10.

In their opposition to these motions, appellees pointed to the steps that they had taken to meet what they described as the "principal concerns" expressed in Section 630. However, recognizing that their actions fell far short of full compliance, appellees also challenged the constitutionality of Section 630 under

the doctrine of separation of powers. To support their claims, appellee Webster submitted a general affidavit asserting that disclosures of SCI may harm national security and that nondisclosure agreements generally help prevent such disclosures — two points that appellants have never challenged, but which in no way support appellees' broad claim of unconstitutionality. J.A. 40-44. Neither that affidavit nor any other evidence in the record even asserts that any of the provisions that are banned by Section 630 are necessary to prevent the disclosure of SCI or other classified information, let alone that their deletion will render the nondisclosure forms ineffective. *Id.*

In a memorandum opinion issued on May 27, 1988, Senior District Judge Oliver Gasch agreed with appellants that appellees had violated Section 630's ban on the execution of additional SF 4193 agreements and that appellee Webster's addendum did not constitute compliance with Section 630. App. 22a-23a & n.16. However, he then held Section 630 unconstitutional in all its applications under the doctrine of separation of powers, despite the lack of evidence of any harm from Section 630's terms. App. 27a. Although the court recognized that "[n]either political branch is expressly charged by the Constitution with regulating accumulation of or access to national security information," App. 25a, it nonetheless concluded that Section 630 departs from Congress' historical role, which the court viewed as limited to "facilitat[ing] secrecy with appropriate criminal and civil sanctions," and seeking information by subpoena or cooperation. App. 26a.

Instead of discussing the provisions of Section 630 that appellees had clearly violated, the court focused exclusively on subsections 3 through 5, which it read to "permit the President to ensure the secrecy of national security information only by those means authorized by Congress." App. 26a-27a. Based on this erroneous construction, and without citing a single case in which a comparable statute had been found to be beyond Congress'

powers, the court declared Section 630 unconstitutional on its face because it "impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations." App. 27a.[5]

E. Post-Decision Developments: Rulings in the Companion Cases and Renewal of Section 630.

Subsequently, on July 29, 1988, the district court ruled in the companion cases that the term "classifiable" is unconstitutionally vague because it "has no readily discernible meaning" on its face. Motion to Affirm at 17a, 23a ("*NFFE/AFGE*"). However, the court concluded that the constitutional infirmity could be remedied if "classifiable" is defined in accordance with the last definition offered by appellee Garfinkel at the October 1987 congressional hearing. *Id.* at 18a-19a. Under that definition, which Congress had rejected in enacting Section 630, "classifiable" refers to information that the employee knows or "reasonably should know" is either classified, even though it is unmarked, or unclassified, but meets the standards for classification and is in the process of being classified. *Id., quoting* 52 Fed. Reg. 48,367 (Dec. 21, 1987) (to be codified at 32 C.F.R. § 2003.20(h)(1)). Accordingly, the court ordered the defendants to notify employees either that the term "classifiable" is stricken from the forms or that it is defined in accordance with the narrowing definition, in which case the forms' ban on disclosures of "classifiable" information could be enforced against the employee. Motion to Affirm at 20a, 23a; J.A. 62-63.

[5]Appellees also challenged the standing of all the appellants. The district court found that appellant AFSA and the unions and individual plaintiffs in the companion cases have standing to seek compliance with Section 630, but that the congressional appellants do not. App. 13a-20a. In their jurisdictional statement, appellants included a question pertaining to congressional standing in order to preserve that claim. However, the Court need not reach that question because appellees have not challenged AFSA's standing. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

The defendants in *NFFE/AFGE* moved to amend the judgment to allow them more time to comply with the court's order and to permit them to notify employees by publishing the Garfinkel definition in the Federal Register. On September 26, 1988, the district court denied this motion in large part, but amended its order to allow the defendants an additional 30 days in which to provide personal notice to the signatories that the term "classifiable" was either deleted or defined in accordance with the court's July 29, 1988 opinion. J.A. 64-65. The government is not appealing, but the *NFFE/AFGE* plaintiffs are appealing on the ground that the term "classifiable" is still unconstitutionally vague, even under the narrowing definition.

After the district court's last ruling, appellee Garfinkel directed agencies to notify current, but not former, employees of the narrowing definition of the term "classifiable." 53 Fed. Reg. 38,278 (Sept. 29, 1988); Motion to Affirm at 13. However, under appellee Garfinkel's notice, employees violate the nondisclosure agreement not only if they know, but also if they "reasonably should know," that the information fits within one of these categories, despite the fact that subsection 1 of Section 630 requires actual knowledge. 53 Fed. Reg. at 38,279 (to be codified at 32 C.F.R. § 2003.20(h)(1)-(3)). Although appellee Webster has not published his directions in the Federal Register, he has represented to this Court that he has issued a similar notice with respect to SF 4193. Motion to Affirm at 13. Furthermore, appellees Webster and Garfinkel have both approved new standard forms that delete the term "classifiable," in keeping with subsection 2 of Section 630, but which recite in its place portions of the definition approved in *NFFE/AFGE* and make no changes to ensure that employees' rights to provide information to Congress are not limited by a prior authorization requirement. 53 Fed. Reg. at 38,278-80; J.A. 54-58, 66-70. Finally, appellee Garfinkel has published a final rule declaring that his nondisclosure forms "do not supersede . . . any other laws of the United

States," but he has not notified employees of this limitation, nor has he included it in his revised form. 53 Fed. Reg. at 38,279 (to be codified at 32 C.F.R. § 2003.20(g)).

Toward the end of Fiscal Year 1988, a Subcommittee of the House Committee on Government Operations held a hearing on the nondisclosure agreement program at which Members of Congress stressed the importance of Section 630's requirement that employees have actual knowledge that information is covered by the agreements and criticized the requirement that employees must obtain prior authorization before providing information to Congress. 1988 Hearing at 21, 37 (Rep. Boxer); *id.* at 48-49, 67, 72-73, 75-76 (Sen. Grassley), *id.* at 5-6, 8, 10-13 (Sen. Proxmire); *id.* at 40 (former Sen. Mathias); *see also* 1988 House Report at 19-21. Moreover, pointing to the Executive Branch's reliance on the district court's decision to thwart a pending military whistleblower protection bill, several Members urged Congress to re-enact Section 630 in order to facilitate this Court's review of the decision. 1988 Hearing at 14-15, 18-20, 25-27 (Rep. Boxer); *id.* at 67, 76 (Sen. Grassley).

Following these suggestions, Congress renewed Section 630 by including it, as Section 619, in the Treasury, Postal Service and General Government Appropriations Act of 1989, Pub. L. No. 100-440, 102 Stat. 1721 (1988). In signing that bill, President Reagan noted his constitutional objections to Section 619, and stated:

> In accordance with my sworn obligation to preserve, protect, and defend the Constitution, section 619 will be considered of no force or effect unless and until the ruling of the District Court is reversed by the Supreme Court.

24 Weekly Comp. Pres. Docs 1189 (Sept. 22, 1988). Because Sections 630 and 619 are identical, except for the year in which they are in effect, we refer to them collectively as Section 630.

SUMMARY OF ARGUMENT

The district court's decision is fundamentally flawed because it overlooks the significant national security powers granted to Congress by the Constitution and vastly overstates those of the Executive Branch. Moreover, under *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the district court's sweeping declaration that Section 630 is unconstitutional in every conceivable application cannot stand because Congress plainly has the power to enact such a limited measure, and there is absolutely no evidence that it impairs the Executive Branch's ability to carry out its constitutional functions.

The first part of Section 630 curbs the use of terms that Congress deemed to be vague and overbroad. Thus, it prohibits the use of the term "classifiable" and spells out the categories of information that are not marked classified but may still be covered by the forms. This aspect of Section 630 does not offend separation of powers because it is tied to the Executive Branch's own classification standards and there is no evidence that it interferes in any way with the Executive Branch's functions. The lack of any unconstitutional interference is underscored by the fact that the term "classifiable" has been declared unconstitutionally vague, that most agencies have complied with the bulk of Section 630's definition, and that one agency has complied with it in its entirety.

Section 630 also prohibits nondisclosure forms from restricting, through a prior authorization requirement, the constitutional and statutory rights that federal employees have to communicate with Congress and that Congress has to obtain Executive Branch information. Since it is the Constitution and other statutes, not Section 630, that establish the underlying rights that employees have to communicate with Congress, Section 630 simply preserves the status quo by forbidding nondisclosure forms from requiring employees to obtain advance permission to disclose

information that they otherwise have a right to convey to Congress. Moreover, the sole relief sought with respect to these provisions consists of notice to those who have signed the forms that the prior authorization requirement cannot be applied to protected congressional disclosures during the funding ban. Since appellee Garfinkel concedes that the nondisclosure forms do not and cannot supersede other laws, and Section 630 merely protects rights under such other laws, providing this notice will not impair the Executive Branch, contrary to the holding of the district court.

ARGUMENT

THE DISTRICT COURT ERRONEOUSLY HELD THAT SECTION 630 IS UNCONSTITUTIONAL IN EVERY CONCEIVABLE APPLICATION.

A. Appellees Have Not Complied With Section 630.

Before reaching the constitutional question, this Court must conclude, as did the district court, that appellees have failed to comply with Section 630. In this regard, appellees have never claimed that they have fully complied with Section 630's requirements. Instead, they have asserted only that they "took steps to accommodate certain of the concerns reflected in Section 630" and these actions "meet the principal concerns that led to the enactment of Section 630." Motion to Affirm at 8, 14.

As the district court correctly found, albeit in somewhat equivocal language, appellees violated Section 630's ban on the use of funds to implement or enforce SF 189 and SF 4193. App. 22a-23a n.16. Thus, the court concluded that the Director of Central Intelligence violated Section 630 by continuing "to require execution of the [SF 4193] form until March 22, 1988 . . .," and that "[t]he addendum to SF 4193, which purports to cleanse the agreement of provisions offensive to section 630,

plainly is not 'true to the congressional mandate from which it derives its authority,' and is based on an 'erroneous view of the law' as Congress has written it." *Id.* (citations omitted).

The district court's conclusion that appellees violated Section 630 is unassailable. First, by simply making an opaque reference to a single section of a 450-page law, appellee Webster's addendum to SF 4193 does not comply with Section 630's express prohibition on the continued use of SF 4193. Second, some agencies required employees to sign SF 4193 or its equivalent without any such addendum, and third, many did not stop using SF 189 until well into Fiscal Year 1988.[6] Indeed, after Section 630 became effective, eighteen agencies required approximately 43,000 employees to sign SF 189 and 6000 more to sign SF 4193 or its equivalent. 1988 Hearing at 166, 173 (GAO Testimony).

Not only were appellees in violation of Section 630 when the district court issued its ruling, but their subsequent actions have reaffirmed their unwillingness to abide by Section 630's requirements. Although appellees Garfinkel and Webster have approved new standard forms that omit the term "classifiable," in compliance with subsection 2, these forms do not comply with subsection 1. That provision limits nondisclosure agreements to information that is "specifically marked as classified" or "unmarked but known by the employee to be [either] classified" or "in the process of a classification determination." In other words, Section 630 requires that employees have actual knowledge that unmarked information is covered by the forms. In contrast, the new standard forms apply to unmarked information that is classified or in the process of a classification determination, without requiring that the employee know of that fact, J.A.

[6]Department of the Navy's Answer to Interrogatory No. 1 (Docket Entry No. 3); Supplemental Responses of Departments of Defense, the Army, the Navy, and the Air Force to Plaintiffs' Interrogatory No. 6 (filed March 15, 1988 in lead case, No. 87-2284-OG, after consolidation).

54, 66, and appellee Garfinkel has published a final rule, stating that employees will be held liable if they "reasonably should know" that information falls within one of these categories. 53 Fed. Reg. at 38,279 (to be codified at 32 C.F.R. § 2003.20(h)(3)). Moreover, despite subsections 3 and 4, the revised forms contain the prior authorization requirement that appellees construe to apply to disclosures that employees have a right to make to Congress. J.A. 54-55, 66-67. In addition, although appellees provided notice of the definition of "classifiable" to current employees, that definition falls short of subsection 1 for the reasons set forth above, and they did not provide any notice to former employees, who are bound forever by the agreements, thereby leaving them to speculate as to what information they may disclose.

Even if appellees had complied with Section 630, which they have not, they have made it clear that they do not feel bound to do so. Thus, the President has "directed that . . . Section 619 [630] will be considered to be of no force and effect unless and until this Court reverses the ruling of the district court in the instant case. . .." Motion to Affirm at 14, *citing* 24 Weekly Comp. Pres. Docs. 1189. Accordingly, this Court must reach the constitutional question presented by the district court's sweeping ruling.[7]

B. The District Court's Decision Seriously Misstates the National Security Powers of Congress and the Executive Branch.

The district court declared Section 630 unconstitutional on the ground that it infringes on inherent presidential powers, without any evidence that Section 630 actually impairs the Executive Branch's ability to protect national security information. This

[7]In its motion to affirm at 14-15, 18-20, appellees argued that this case had become moot. We disagree for the reasons set forth above and in our opposition to the motion to affirm. However, if the Court decides that the case is moot, it should vacate the district court's opinion. *United States* v. *Munsingwear*, 340 U.S. 36 (1940).

sweeping ruling strikes down Section 630 in every conceivable manifestation in disregard of the presumption of constitutionality that attaches to duly enacted laws, *see Bowen v. Kendrick*, 108 S. Ct. 2562, 2578-79 (1988). In addition, the district court violated its obligation to formulate a rule of law no broader than necessary to decide the issues before it, or than is warranted by the precise facts of the case, *see Garner v. Louisiana*, 368 U.S. 157, 163 (1945). The decision further departs from the cautious approach followed by this Court when reviewing facial challenges to statutes, especially those asserting violations of the doctrine of separation of powers, where some showing of actual impairment to the constitutional functions of a branch of government is required. *See Morrison v. Olson*, 108 S. Ct. 2597, 2614 (1988); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) ("*Nixon v. GSA*").

Where Congress and the Executive Branch have shared responsibilities, and Congress' action does not contravene any express constitutional provision, this Court has applied a pragmatic balancing test to determine whether the action of one branch unduly impinges on the province of the other:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Nixon v. GSA, 433 U.S. at 441, 443 (citing *United States v. Nixon*, 418 U.S. 683, 711-12 (1974)); *accord Morrison v. Olson*, 108 S. Ct. at 2616, 2621; *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851-52 (1986). However, the district court

never engaged in that balancing process because it assumed that only the Executive Branch has the constitutional power to regulate national security information, which would call into question countless other statutes in addition to Section 630. *See, e.g.*, Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1811; Classified Information Procedures Act, 18 U.S.C. App.§§ 1-16; Freedom of Information Act, 5 U.S.C. § 552(b)(1). In adopting this approach, the district court erred both in making that unprecedented assumption and in consequently failing to apply the controlling test.

1. Congress Has Extensive Powers That Enable It To Regulate National Security Information.

In ruling that the President's inherent powers disable Congress from regulating the disclosure of national security information, the district court completely overlooked Congress' constitutional role in national security and appropriations matters. The Constitution assigns Congress specific enumerated powers relating to national security, such as the powers "to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;" to "provide for the common Defence;" "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;" "to raise and support Armies;" "to provide and maintain a Navy;" "to make Rules for the Government and Regulation of the land and naval Forces;" to exercise exclusive authority over property acquired "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;" and "to provide for organizing, arming, and disciplining the Militia," and "for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8, cls. 1, 10-17.

The war power, in particular, implies expansive peacetime powers including the establishment of "compulsory military

service, control of activities related to atomic energy, [and] comprehensive security programs affecting millions of employees of the federal government and of government contractors." L. Henkin, *Foreign Affairs and the Constitution* 71-72 (1972) (footnote omitted). Congress also has the power "to regulate Commerce with foreign Nations," to "regulate the Value . . . of foreign Coin," and "to establish a uniform Rule of Naturalization." U.S. Const. art. I, § 8, cls. 3-5. And the Senate's power to pass on treaties and appointments of ambassadors and other officers who deal with national security and foreign affairs matters gives it considerable authority in numerous aspects of foreign affairs. *See* U.S. Const. art. II, § 2, cl. 2. In all of these respects, the Constitution assigns Congress substantial powers that directly bear on national security matters.

Aside from its specific national security powers, Congress is the repository of all legislative powers, including the power to make all laws that are necessary and proper for carrying out its powers and the powers of the entire United States government, U.S. Const. art I, §§ 1 & 8, cl. 18, as well as the power to tax and spend for the general welfare, art. I, § 8, cl. 1. *See United States v. Butler*, 297 U.S. 1, 65-66 (1935). Congress also has expansive authority through the power of the purse, U.S. Const. art. I, § 9, cl. 7, which James Madison characterized as the "most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." *The Federalist* No. 58, at 380 (E. Earle ed. 1937); *id.* No. 48, at 323 (J. Madison) (power of the purse makes other branches dependent on Congress). Finally, Congress' power of impeachment, which extends to all officers of the United States, not just to the President, provides the ultimate check on executive actions. U.S. Const. art. I, § 2, cl. 5 & § 3, cl. 6.

These powers provide Congress ample authority to regulate

access to national security information held by the Executive Branch. *See Nixon v. GSA*, 433 U.S. at 445 (legislative regulation of Executive Branch documents has "never been considered invalid as an invasion of [Executive Branch] autonomy"); *EPA v. Mink*, 410 U.S. 73, 83 (1973) (construing the Freedom of Information Act exemption for classified information and stating "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures — subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering.")

It is also unquestionable that Congress has the power to regulate the relationship between the Executive Branch and its employees. *See, e.g.*, Civil Service Reform Act of 1978, 5 U.S.C. §§ 2302-2303 (prohibited personnel practices); *Bush v. Lucas*, 462 U.S. 367, 379-84, 389 (1983) (Congress has authority to prescribe remedies for violations of federal employees' First Amendment rights and other improper personnel actions). Moreover, this power does not end merely because national security may enter into the equation. *See, e.g., Cole v. Young*, 351 U.S. 536, 544-48 (1956) (power to limit Executive Branch authority to terminate employees for national security reasons to positions directly concerned with national security matters). Furthermore, in several recent cases, this Court has construed statutes to determine whether employees may obtain administrative or judicial review of adverse security clearance determinations. *Carlucci v. Doe*, 57 U.S.L.W. 4025 (U.S. Dec. 6, 1988) (No. 87-751); *Webster v. Doe*, 108 S. Ct. 2047 (1988); *Department of the Navy v. Egan*, 108 S. Ct. 818 (1988). It would be wholly unnecessary to engage in such statutory construction if Congress could not constitutionally pass legislation in the area.

Given Congress' broad legislative and appropriations powers, it is presumed to have broad power to pass legislation, including in the area of national security, provided that the law does not

violate an express constitutional provision or prevent the President from carrying out his constitutional functions. *Nixon v. GSA*. Neither appellees nor the district court have pointed to any specific constitutional provision that prevents Congress from regulating national security information. *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976) (Appointments Clause, U.S. Const. art. II, § 2, cl. 2); *Ex Parte Garland*, 71 U.S. 366 (1867) (presidential pardon power, U.S. Const. art. II, § 2, cl. 1). Nor have they made any showing that Congress' action actually prevents the Executive Branch from performing its constitutionally assigned functions. Instead, they construe the President's general powers as chief executive and commander-in-chief to give the Executive Branch exclusive authority over national security matters, even though this Court has never struck down a duly enacted statute based on these general powers.

2. The Executive Branch's National Security Powers, Though Important, Are Limited By Both The Constitution And Actions Of Congress Pursuant To Its Constitutional Powers.

Although the President has broad authority over national security matters, his powers are circumscribed by both the Constitution and Congress' coordinate role. Without addressing either Congress' power or the limits imposed on the President by the Constitution, the district court held that the Executive Branch's power over national security information precludes Congress from regulating that field at all. The principal case cited in support of such a claim is *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), which concerned a challenge to a congressional delegation to the President of the power to forbid certain arms sales if he found that such a ban would promote peace. In rejecting an undue delegation challenge, the Court observed that Congress could delegate broader powers to the President in the field of foreign affairs than it could in the

domestic arena. 299 U.S. at 321-22. Although Justice Sutherland's opinion speaks in *dicta* of plenary and inherent presidential powers over foreign affairs, Justice Jackson's seminal opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 n.2, 646-47 (1952), subsequently construed *Curtiss-Wright* to mean only that "the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress." *See also id.* at 587-88 (rejecting claims of inherent presidential power to seize steel mills).[8]

Similarly, in *Nixon v. GSA*, the Court turned aside former President Nixon's separation of powers challenge to the Presidential Recordings and Materials Preservation Act, 44 U.S.C.§ 2111 note (the "Materials Act"). At the outset, the Court rejected the contention that the mere regulation of the presidential materials, including many relating to national security matters, "constitutes, without more, a violation of the principle of separation of powers." 433 U.S. at 441. Instead, applying a flexible balancing test, the Court held that "nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face." *Id.* at 445. In support of this conclusion, the Court pointed to the "abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch," which "has never been considered invalid as an invasion of [Executive Branch] autonomy." *Id.* at 445 (*citing*, e.g., the Freedom of Information Act, 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, and the Government in the Sunshine Act, 5 U.S.C. § 552b).

Likewise, *Youngstown* establishes that Congress has ample authority to impose restraints on most presidential national security powers. That case arose when President Truman di-

[8]Much of the authority relied on by Justice Sutherland for an exclusive presidential role in foreign affairs has subsequently been controverted. *See, e.g.*, Lofgren, *United States v. Curtiss-Wright Export Corp.: An Historical Reassessment*, 83 Yale L.J. 1, 24-28, 30-31 (1973).

rected the Secretary of Commerce to seize and operate the steel mills in order to avert a nationwide strike in the steel industry, which, he concluded, would imperil weapons production for the Korean War. In an opinion written by Justice Black, the Court held the seizure orders invalid because Congress had not given the President the power to seize the steel mills, and the President therefore lacked such authority, even under his constitutional powers as chief executive and commander-in-chief. 343 U.S. at 586-89.

It is Justice Jackson's oft-cited concurring opinion that establishes the framework for evaluating presidential powers in the face of congressional restrictions. *Id.* at 635. Thus, although the President's authority is at its maximum when he acts pursuant to an express or implied authorization of Congress, it is weaker in the "zone of twilight in which he and Congress may have concurrent authority." *Id.* at 635, 637. In the latter situation, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." *Id.* at 637. However, in contrast to presidential actions founded on congressional authorization or acquiescence, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* Since courts can sustain such claims of presidential power "only by disabling the Congress from acting upon the subject," Justice Jackson warned, "[p]residential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id.* at 637-38 (footnote omitted).

In the national security area, this Court has never upheld an Executive Branch action that violated a specific act of Congress. Instead, it has upheld only those Executive Branch actions that

are expressly or impliedly authorized by congressional action or acquiescence. Thus, the Court's opinion in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), which credited Justice Jackson's *Youngstown* framework with "bring[ing] together as much combination of analysis and common sense as there is in this area," *id.* at 661, upheld one aspect of the challenged executive agreements because it was expressly authorized by statute. *Id.* at 669-70, 673-74. Although that express authorization did not extend to the suspension of claims pending in United States courts, the Court implied congressional authorization for the remainder of the executive agreements based on congressional acceptance of, and acquiescence in, executive claims settlement. *Id.* at 677-81. Likewise, in *Regan v. Wald*, 468 U.S. 222 (1984), and *Zemel v. Rusk*, 381 U.S. 1 (1965), the Court determined that Congress had authorized the Executive Branch to impose the challenged limitations on travel by United States citizens. And in *Haig v. Agee*, 453 U.S. 280 (1981), the Court held that, through longstanding congressional acquiescence, Congress had authorized the Executive Branch to revoke passports in the interest of national security.

On the other hand, where Congress has denied authorization to the Executive Branch to carry out certain actions, the Court has rejected claims of executive power that accordingly fall within *Youngstown's* "lowest ebb." For example, in *New York Times Co. v. United States*, 403 U.S. 713 (1971), the Executive Branch claimed that it had inherent authority to restrain the publication of the Pentagon Papers. In a *per curiam* opinion, the Court held that the First Amendment bar on prior restraints precluded the issuance of the requested injunction. *Id.* at 714. Five of the six concurring Justices also dismissed the broad claim of presidential power because Congress had failed to give the President such power and had explicitly rejected legislation that would have delegated this authority to the President. *Id.* at 732-33, 740 (White, J., joined by Stewart, J., concurring); *id.* at 741-

47, 742 (Marshall, J., concurring) ("It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit."); *see also id.* at 718 (Black, J., joined by Douglas, J., concurring); *id.* at 720-23 (Douglas, J., joined by Black, J., concurring).

Long before *Youngstown*, the Court ruled in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), that the Executive Branch had no authority in an undeclared war with France to seize ships that fell outside the terms of Congress' express authorization. Indeed, the Court held that a Navy official was personally liable for damages for seizing a ship in contravention of the statute, even though the seizure complied with orders issued by the Secretary of the Navy. Regardless of what authority the President might have had if Congress had been silent, once Congress acted, the Court observed, instructions issued by Executive Branch officials could not "legalize an act which, without those instructions, would have been a plain trespass." 6 U.S. at 177, 179; *see also Brown v. United States*, 12 U.S. (8 Cranch) 109 (1814) (declaration of war alone does not authorize Executive Branch to confiscate enemy property within the United States).

In *Little*, the Secretary of the Navy's orders went beyond the specific authorization granted to the Executive Branch by statute, and in *New York Times* and *Youngstown*, Congress had declined to authorize the action taken by the Executive Branch. Here, presidential power is at an even lower ebb because Congress has twice passed a statute expressly forbidding the Executive Branch from including certain terms in its nondisclosure forms. Because the Executive Branch's actions run counter to a much clearer and more emphatic expression of Congress' will, they are far more "vulnerable to attack" and "in the least favorable of possible constitutional postures." *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring).

Nonetheless, without even acknowledging this Court's re-

peated rejection of claims of unlimited presidential powers, and its recognition of Congress' ability to constrain such powers, the district court did precisely what this Court declined to do in *Nixon v. GSA*: it ruled that a duly enacted statute regulating Executive Branch information "constitutes, without more, a violation of separation of powers." 433 U.S. at 441. Given Congress' considerable authority over national security matters, and the Executive Branch's important, but not unlimited, corollary powers, it was plainly erroneous for the district court to decide this case without applying the *Nixon v. GSA* balancing test.

C. Section 630 Does Not Prevent the Executive Branch From Carrying Out its Constitutional Functions.

Under the *Nixon v. GSA* test, the Court must determine whether Section 630 "prevents the Executive Branch from accomplishing its constitutionally assigned functions," and if so, "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. GSA*, 433 U.S. at 441, 443. Since *Nixon v. GSA* establishes that the mere regulation of national security information does not disrupt the Executive Branch, the focus must be on the demonstrated harm, if any, that Section 630's specific provisions impose on the Executive Branch.

Section 630 regulates two aspects of nondisclosure forms. First, subsections 1 and 2 place discrete limits on the information that can be covered by such agreements. Second, subsections 3 and 4 prohibit the agreements from requiring employees to obtain prior authorization for disclosures to Congress, but only where the employee otherwise has a right to disclose the information to Congress, or Congress has a right to obtain it. Subsection 5, which forbids nondisclosure agreements from imposing obligations that are inconsistent with other statutes, principally

reinforces Section 630's other prohibitions.[9]

1. Section 630's Limits On The Information That May Be Covered By Nondisclosure Agreements Do Not Disrupt The Executive Branch.

Subsections 1 and 2 place certain discrete limits on the information that may be covered by nondisclosure agreements. Thus, subsection 2 prohibits the use of the term "classifiable," and subsection 1 provides that nondisclosure agreements may only extend to information that is (1) specifically marked as classified; (2) unmarked but known by the employee to be classified; or (3) unclassified but known by the employee to be in the process of a classification determination.

In addition, subsection 5 prohibits nondisclosure agreements from imposing obligations or invoking remedies that are inconsistent with statutory law. Although Section 630 identifies no specific statutes, the floor statement of one of its sponsors referred to the whistleblower protections of the civil service laws. 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987) (Rep. Brooks); *see also* 1987 Hearing at 9-10, 157-64 (Sen. Grassley & Congressional Research Service opinion). One provision of the Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(8)(A), makes it illegal to retaliate against federal employees for publicly disclosing information that they reasonably believe evidences illegality, mismanagement, a gross waste of funds, an abuse of authority, or a substantial danger to public health and safety, provided that the information is "not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." Thus, this statute, in conjunction with subsection 5, also prohibits nondisclosure

[9]Although Section 630 bans the implementation of SF 189 and SF 4193 by name, it also allows the Executive Branch to use other forms, provided that they comply with the rest of Section 630. Therefore, the ban on execution of SF 189 and SF 4193 does not disrupt the Executive Branch unless the remainder of Section 630 does so.

agreements from authorizing disciplinary action for the disclosure of information that is merely "classifiable," but not actually classified.[10]

Subsections 1 and 2 of Section 630, along with this statute, ensure that employees will not be bound by certain vague terms or held responsible for constructive, as opposed to actual, knowledge that information is subject to the agreement. 1988 House Report at 19-20. The district court held these provisions unconstitutional in all their applications, even though there is absolutely no evidence that they have any adverse effect on the Executive Branch's ability to protect national security information, let alone an effect so debilitating that it would prevent the Executive Branch from performing its constitutional functions, as *Nixon v. GSA* requires.

No plausible argument can be made that Congress lacks the authority to ban the use of the term "classifiable," especially since the same district judge who decided this case subsequently found the term "classifiable" unconstitutionally vague and banned its use unless it was narrowly defined. Motion to Affirm at 16a-20a, 23a; J.A. 61-65. It surely cannot be the law that a district court can forbid the Executive Branch from using a vague term, but Congress is constitutionally precluded by the doctrine of separation of powers from doing the same. On the contrary, Congress has expansive powers to regulate Executive Branch information, including that related to national security, and the relationship between the Executive Branch and its employees, *supra* at 22-25, and Congress is particularly well-equipped to make broad policy judgments, especially those implicating constitutional rights. *See United States v. Robel*, 389 U.S. 258, 276-77 (1967) (Brennan, J., concurring); *Kent v. Dulles*, 357 U.S. 116, 129 (1958); A. Bickel, *The Least Dangerous Branch* 161

[10]The Civil Service Reform Act does not "authorize the withholding of [classified] information from the Congress or the taking of any personnel action against an employee who discloses [classified] information to the Congress." 5 U.S.C. § 2302(b).

(1962) (the closer the proximity of a matter to a constitutional right "the more important it is that it be decided in the first instance by the legislature").

Not only does Congress have the authority to ban the use of a vague term, but appellees have introduced no evidence substantiating a need to use the term "classifiable." Neither NSDD-84, nor the task force recommendations on which it is based, pointed to a need to protect anything other than classified information, and appellees never informed Congress of any harmful disclosures of "classifiable," as opposed to classified information. J.A. 11-14; 1983-1984 House Judiciary Comm. Hearing at 166-80; *see, e.g.*, 1987 Hearing at 88-89 (Garfinkel Testimony). Moreover, appellee Webster's affidavit, which discussed the general importance of preventing unauthorized disclosures of SCI, never mentioned the term "classifiable." J.A. 40-44. This is not surprising since the CIA nondisclosure form relied on in *Snepp v. United States*, 444 U.S. 507, 508 (1980) (per curiam), banned unauthorized disclosures of only classified, not "classifiable," information, even though the prepublication review obligations extended beyond classified information.

Furthermore, both appellees Garfinkel and Webster have now approved new agreements that delete the term "classifiable." J.A. 54, 66. In addition, appellee Garfinkel has expressly stated that his nondisclosure forms "do not supersede the provisions of section 2302, Title 5, United States Code, which pertain to the protected disclosure of information by Government employees, or any other laws of the United States." 53 Fed. Reg. at 38,279 (to be codified at 32 C.F.R. § 2003.20(g)). These steps toward compliance with subsection 2 (and subsection 5) demonstrate that full compliance will cause no harm to national security. Thus, since appellees have shown that they can fulfill their missions without resort to the term "classifiable," no purpose would be served by retaining the prerogative to reinstate the term in future forms. Similarly, if no harm has come from deleting the

term "classifiable" for current employees, who have day-to-day exposure to classified information, it is hard to imagine what harm will flow from informing former employees that the term is unenforceable.

Subsection 1, which provides that nondisclosure agreements may apply only to information that is marked classified, or that the employee knows is either classified or in the process of a classification review, also leaves the Executive Branch's mission unimpaired. The marking requirement is based on the Executive Branch's own classification scheme, which mandates that classified information be marked as such at the time of classification, Exec. Order 12,356, § 1.5, and that SCI "be distinctively marked so that individuals with authorized access to such information would be aware of its identity." 1983 Senate Hearing at 27 (Richard K. Willard, Deputy Assistant Attorney General); DCI Security Committee, *Sensitive Compartmented Information: Characteristics & Security Requirements* (June 1984) (J.A. 49); *see also* 18 U.S.C. § 798(b) (classified information must be specifically designated at the time of the violation); 50 U.S.C. § 426(1) (classified information must be clearly marked). Not only has the Executive Branch established the classification standards that are incorporated into Section 630, but Section 630 also leaves to the Executive Branch the responsibility for deciding whether particular information meets those standards. In other words, it is the Executive Branch that makes classification determinations and applies the markings that give employees notice that information is subject to the nondisclosure agreement.

In *Nixon v. GSA*, the Court found no disruption of the Executive Branch, in part, because an Executive Branch official would take control and screen the records subject to the Materials Act and would promulgate the regulations that would govern public access. Section 630's marking requirement likewise causes no disruption to the Executive Branch because it defers to the

Executive Branch's classification standards and relies on Executive Branch implementation of those standards. Thus, unlike judicial review of Freedom of Information Act denials and prepublication review determinations, and the sanctions provision of Executive Order 12,356, Section 630 does not require that information be *properly* classified before it can be covered by a nondisclosure agreement; a classification marking is all that is required. *Cf.* 5 U.S.C. § 552(b)(1) (information must be *properly* classified to be exempt from disclosure under Freedom of Information Act); *McGehee v. CIA*, 718 F.2d 1137, 1147-49 (D.C. Cir. 1983) (prepublication review may bar publication of only information that is actually and *properly* classified); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1367, 1369 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975) (same); Exec Order 12,356, § 5.4(b)(1) (allows sanctions only for knowing or negligent disclosures of *properly* classified information).

Other aspects of subsection 1 respond to the only need expressed by the Executive Branch to go beyond marked classified information. In congressional hearings, appellee Garfinkel testified that nondisclosure agreements must be broad enough to cover oral communications of classified information (which, by their nature, are unmarked), unmarked notes from classified meetings, and information that is in the process of a classification determination. 1987 Hearing at 63, 78, 99. Thus, Section 630 allows nondisclosure agreements to cover unmarked information that the employee knows is classified and unclassified information that the employee knows is in the process of a classification determination, even though neither type of information is classified under Executive Order 12,356, which requires classification markings and limits interim classifications to thirty days only. Exec. Order 12,356, §§ 1.1(c), 1.2(e), 1.5; 1988 House Report at 10 n.36. Since the President's own Executive Order does not give the Executive Branch as much discretion as afforded by Section 630, both in terms of treating

unmarked documents as classified and in allowing sanctions for unauthorized disclosures of information that is not properly classified, *see id.* § 5.4(b)(1), there is no basis for claiming that a law providing this added leeway unconstitutionally impairs the Executive Branch.

Significantly, the Executive Branch does not argue that the categories listed in Section 630 provide insufficient protection for sensitive information. Instead, appellees contend that it is unconstitutional for Congress to require that employees must have actual knowledge that specific information is covered by a nondisclosure agreement before they may be disciplined for disclosing it. Accordingly, appellees assert that the Constitution entitles them to disregard Section 630's actual knowledge requirement in favor of a reason-to-know standard.

In support of this claim, appellees contend that Congress may not prevent the Executive Branch from holding employees liable for "[t]he careless handling of national security information." Motion to Affirm at 22. However, nothing in Section 630 specifies the standard of care that employees must exercise in handling classified information. Section 630 merely defines the information that may be covered by a nondisclosure form; presumably an employee may be held liable for the negligent or careless handling of information if it is marked classified or he or she knows that it is otherwise covered by the agreement.

Not only does Congress have the constitutional power to impose such a limitation, but it is also well-suited to making this determination. *See supra* at 32-33. Through the actual knowledge requirement, Congress sought to ensure that agencies would not resurrect the uncertainty surrounding the term "classifiable" by taking the position that employees have reason to know that unmarked information is classified or being classified unless they obtain advance permission from their superiors to disclose it. *See* 1988 Hearing at 21 (Rep. Boxer); *id.* at 67, 75-76 (Sen. Grassley); 1988 House Report at 10 n.36. Section 630's

knowledge requirement is less stringent than that in other statutes, such as the Intelligence Identities Protection Act, which imposes criminal liability for intentional disclosures of the identity of a covert agent only where the individual "know[s] that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States." 50 U.S.C. § 421 (a)-(b); *see also id.* § 421(c) (adds requirement that the intelligence relationship be classified). Moreover, Section 630 still defers to the Executive Branch for the standards controlling classification and for the decision that information should undergo a classification determination. Finally, the Executive Branch has control over briefing federal employees and marking documents so that employees will know which information falls within these nondisclosure categories.

As with its challenge to the elimination of the term "classifiable," appellees introduced no evidence that subsection 1, including its actual knowledge requirement, impairs the Executive Branch's ability to perform its constitutional functions. The Webster affidavit states only that SCI, which is required to be "distinctively marked," must be protected, but it puts forth no reason for nondisclosure agreements to reach beyond marked information. J.A. 40-44, 49. On the other hand, the only pertinent evidence undercuts any impairment claim. Thus, the National Security Council struck the term "classifiable," and inserted subsection 1 verbatim into its nondisclosure form. J.A. 59-60. If an agency as sensitive and closely tied to the President as the National Security Council can comply with subsections 1 and 2 without any harm to its mission, then it defies logic to contend that substantial harm would flow from compliance by other far less sensitive agencies, such as the Federal Maritime Commission, the Marine Mammal Commission, the Small Business Administration, and the Postal Service, which also use nondisclosure forms. 1986 GAO Report at 8.

2. Section 630's Protections of Disclosures to Congress Do Not Violate the Doctrine of Separation of Powers.

As shown above, *supra* at 22-25, Congress has substantial power to legislate in the national security area, and hence Section 630's limitations on the Executive Branch's ability to impose a prior authorization requirement on certain disclosures to Congress are facially valid. Nonetheless, the district court held these provisions unconstitutional in all their applications as a violation of separation of powers. In doing so, the court found no undue disruption as required by *Nixon v. GSA*, nor could it, given the limited nature of both the relief requested and the protections afforded by subsections 3 and 4.

The sole relief sought with respect to this aspect of Section 630 is an order directing appellees to notify all signatories of the limitations imposed by Section 630 on the enforceability of the prior authorization requirement in the nondisclosure forms. Such a notice would be essentially the same as the one that appellee Garfinkel published in the Federal Register as a final rule, stating that his nondisclosure forms do not supersede existing laws, which includes many of the laws that establish rights protected by subsections 3 and 4. 53 Fed. Reg. at 38,279 (to be codified at 32 C.F.R. § 2003.20(g)). Since appellee Garfinkel concedes that the nondisclosure forms do not override other laws, providing this notice to all signatories would not unduly disrupt the Executive Branch, and therefore the district court's conclusion that these provisions violate separation of powers must be set aside.

In condemning subsections 3 and 4 in all their applications, the district court misunderstood the meaning of these provisions, which, by their terms, do no more than prevent nondisclosure agreements from infringing existing rights. Thus, subsection 3 prohibits nondisclosure agreements from obstructing, through a prior authorization requirement or similar restriction, "the right of any individual to petition or communicate with Members of

Congress in a secure manner as provided by the rules and procedures of the Congress." Its flipside, subsection 4, prevents nondisclosure agreements from interfering with Congress' reciprocal right to obtain Executive Branch information in a secure manner in accordance with congressional rules.

In enacting Section 630, Congress did not create new rights but only preserved the status quo pending further action by Congress or through negotiations between Congress and the Executive Branch. 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987) (Rep. Brooks). Thus, at the hearing on renewing Section 630, Senator Grassley stressed that nondisclosure forms "must be consistent with current law," and "cannot supersede those laws that protect a government employee's right to disclose information to Congress." 1988 Hearing at 80; 1987 Hearing at 8-9 (nondisclosure forms "should in no way conflict with the current law or rights provided under the Constitution.") Therefore, he urged Congress to re-enact Section 630 in order "to preserve the right of Congressional access to executive branch information," 1988 Hearing at 80, and to prevent the Executive Branch from "restrict[ing] information that would otherwise be available to Congress." *Id.* at 49, 72; *see also id.* at 36 (Sen. Proxmire) (the nondisclosure forms "as modified may still place in jeopardy pre-existing rights of employees and Congress.") Even appellees recognize that Section 630 does not "*confer* a 'right' on an Executive Branch employee" but "take[s] as a given (and afford[s] protection to) whatever 'right' to petition or supply information to Congress that an individual might derive from some independent legal source, such as the First Amendment." Motion to Affirm at 26 (emphasis in original). Accordingly, this part of Section 630 provides only that nondisclosure forms may not require employees to seek permission before exercising a pre-existing right under the Constitution or a statute to disclose information to Congress.

Subsection 5 reinforces subsections 3 and 4 and confirms that

Congress simply preserved existing rights. Contrary to the district court's construction of subsection 5, it does not allow the Executive Branch to protect national security information only by means authorized by Congress. App. 26a-27a. Rather, it explicitly prohibits only the creation of "obligations" or "remedies" through nondisclosure agreements that are "inconsistent with statutory law." In other words, Executive Branch actions in derogation of subsection 5 are doubly forbidden because they contravene both the underlying statute and Section 630.

As an example of the pre-existing measures given added protection in subsection 5, Section 630's legislative history expressly refers to the whistleblower protection provisions of the civil service laws and in particular to 5 U.S.C. § 7211. 1988 Hearing at 5-6 (Sen. Proxmire); 1988 House Report at 20; 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987) (Rep. Brooks). That law, which was enacted in 1912, provides:

> The right of employees, either individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

Section 7211 nullified two presidential gag orders promulgated early in this century. The first, issued by President Theodore Roosevelt, forbade all federal employees, upon penalty of dismissal, from attempting to influence any legislation before Congress except through their department heads. Exec. Order of Jan. 25, 1906, *reprinted in* 48 Cong. Rec. 10,729-30 (1912). President Taft issued the second order to expand the restrictions by prohibiting federal employees from petitioning for legislation or other congressional action of any kind without the consent of their department head, and from responding to any request for information from either House of Congress, any congressional

committee, or any Member of Congress except through their department heads. Exec. Order of Nov. 26, 1910, *reprinted in* 48 Cong. Rec. 10,730 (1912). Stressing both federal employees' rights to petition Congress, and Congress' need for information held by federal employees, Congress enacted Section 7211 to overrule these orders and "to protect employees . . . in the right of free speech and the right to consult their Representatives." H.R. Rep. No. 388, 62d Cong., 2d Sess. 7 (1912); 48 Cong. Rec. 5634-35 (1912) (Rep. Lloyd); *id.* at 4653 (Rep. Calder); *id.* at 5223 (Rep. O'Shaunessy); *id.* at 10,673-74 (Sen. Reed).

Another statute, 10 U.S.C. § 1034, which prohibits "restrict[ing] a member of the armed forces in communicating with a Member of Congress," has strikingly similar origins. It was enacted in 1951 to overrule a requirement that Navy personnel send their communications with Members of Congress through official channels on penalty of court martial, which the Navy tried to justify as a means to ensure that Navy personnel would not lobby on Navy-related legislation. 97 Cong. Rec. 3776 (1951); *see Brown v. Glines*, 444 U.S. 348, 358-59 (1980). Initially, the statute had an exception for classified information, but a recent amendment has eliminated that exception and provided added protection to disclosures about fraud, waste, illegal conduct, and public health and safety matters. Pub. L. No. 100-456, § 846, 100th Cong., 2d Sess. (Oct. 29, 1988).

Few cases have construed the rights protected under Sections 7211 or 1034. Thus, although no cases have addressed the extent to which Section 7211 creates rights beyond those embodied in the First Amendment, it is clear that, at a minimum, it ensures federal employees the same First Amendment rights enjoyed by others, *see Bush v. Lucas*, 462 U.S. at 384 & n.24, and Section 1034 most likely affords greater protection. *See Brown v. Glines*, 444 U.S. at 359-61. In any event, the history of these sections demonstrates that they prohibit imposing a prior authorization requirement on the exercise of whatever rights they protect,

which Section 630 reinforces and extends to nondisclosure forms.

Subsection 4, which prevents nondisclosure forms from imposing limitations on Congress' rights to obtain information, also protects rights that derive from sources other than Section 630. Thus, it has long been recognized that Congress "cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change," which, of course, includes a vast array of national security matters. *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975). As this Court has confirmed, Congress' power of inquiry is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution," *Barenblatt v. United States*, 360 U.S. 109, 111 (1959), and encompasses "inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes [and] . . . probes into departments of the Federal Government to expose corruption, inefficiency or waste." *Watkins v. United States*, 354 U.S. 178, 187 (1957).

The power of impeachment also gives the House of Representatives "the right to investigate the conduct of all public officers under the Government.. . . [and] would penetrate into the most secret recesses of the Executive Departments" and extend to "all papers, public or private, official or unofficial." IV J. Richardson, *A Compilation of the Messages & Papers of the Presidents* 1787-1897, at 431, 434 (1899) (Statement of President Polk, April 20, 1846). Thus, when President Washington refused to provide the House negotiating records pertaining to the Jay Treaty, he made it clear that he would provide such records if the House requested them for an impeachment investigation. I J. Richardson, *supra*, at 194-95 (Statement of March 30, 1796).

Since the President possesses more extensive sources of information than Congress regarding both domestic and foreign

affairs, "[t]here is great wisdom, therefore, in not merely allowing, but in requiring, the president to lay before congress all facts and information which may assist their deliberations . . .." 3 J. Story, *Commentaries on the Constitution of the United States*, § 1555 (1905). In keeping with this sentiment, presidents have generally provided complete information to Congress ever since President Washington's full disclosure in response to the House of Representatives' first request for records in 1792 pertaining to the failed St. Clair expedition. A. Schiesinger, *The Imperial Presidency* 16, 43-49 (1973); Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, §§ II & IV, __ Wm. & Mary L. Rev. __ (1988) (lodged with the Court in *United States v. Mistretta & Mistretta v. United States*, Nos. 87-1904 & 87-7028).

As a result, Congress has come to depend on a wide range of information to carry out its legislative, budget, and oversight responsibilities. Federal employees fill in the gaps in the "often one-sided and self-serving" information voluntarily provided by the Executive Branch by "direct[ing] Congress to a problematic aspect of what may be an otherwise impenetrable subject matter, which is what happened with disclosures about [problems with] the B-1 Bomber and MX missiles," faulty and overpriced weapons and spare parts, and "reservists remaining in Central America for tours that exceeded the legal time limit on such stays." J.A. 35 (Affidavit of Rep. Boxer); *see also* 1988 Hearings at 19-20 (Rep. Boxer) ($7600 coffee brewers, $300 "No Smoking" sign, $600 armrest on C-5 cargo plane, adequacy of testing of Bradley Fighting Vehicle, problems with inventory supply system in Europe, payments to Naval Reserve Officers for training missions they never flew); *id.* at 6, 12 (Sen. Proxmire) ($2 billion cost overrun in C-5A cargo aircraft).

Contrary to the district court's views, App. 26a, nothing in the Constitution requires Congress to use a subpoena as the sole means of obtaining Executive Branch information. In fact, the

subpoena power is not even listed in the Constitution, but has been implied to enable Congress to compel the Executive Branch to provide Congress information that it needs to perform its constitutional functions, when voluntary requests prove insufficient. *See McGrain*, 273 U.S. at 161, 173-74. Thus, just as no one would suggest that Congress cannot make requests for information without issuing a subpoena, so too the subpoena power does not constitutionally bar Congress from passing laws that protect its access to information through other means, as it has often done in mandatory reporting requirements, such as the Intelligence Oversight Act, 50 U.S.C. §§ 413-415. *See In re Chapman*, 166 U.S. 661 (1896) (Congress has inherent power to punish by contempt refusals to provide information but can also pass a statute making such actions a misdemeanor); *Sinclair v. United States*, 279 U.S. 263 (1929) (2 U.S.C. § 192 applies to voluntary appearances as well as to those pursuant to subpoena); *see also* 18 U.S.C. § 1505 (making it a crime to impede a congressional investigation). This makes eminent sense since, as appellant Boxer observed, "[s]ubpoenas place the executive and legislative branches at loggerheads and thus heighten the adversarial rather than the cooperative aspects of the relationship, which is counterproductive in the long run." J.A. 35.

By protecting these rights of Congress and federal employees, Section 630 does not, as the district court concluded, "depart[] from history and threaten[] the balance struck by time." App. 26a. Instead, it prevents the Executive Branch from unilaterally upsetting the status quo through nondisclosure forms. Thus, Section 630 prevents nondisclosure forms from impeding the exercise of existing rights, but has no effect on the Executive Branch's power to punish whatever unauthorized disclosures of information to Congress that it previously could have punished.

Accordingly, subsections 3 and 4 can be unconstitutional only if the current scheme creates the kind of impediment required by *Nixon v. GSA*. Yet both appellees and the district court are silent

as to any shortcomings in the underlying statutes and rights that are necessarily invalidated by the district court's ruling. Neither NSDD-84 nor the task force report identified any need to depart from the historic practice and restrict disclosures to Congress through a prior authorization requirement. Nor does Executive Order 12,356 call for such a limitation. Instead, it provides only that "[c]lassified information shall not be disseminated outside the executive branch except under conditions that ensure that the information will be given protection equivalent to that afforded within the executive branch." Exec. Order 12,356, § 4.1(c). Section 630 contains a similar limitation by requiring that disclosures be made in a secure manner as provided by congressional rules and procedures, which appellees have never claimed afford inadequate protection.[11]

Not only is there no evidence that subsections 3 and 4 impair the Executive Branch, but even appellees' assertion of such an impairment is grossly misplaced since appellants invoked these provisions only as part of their request for notification to signatories that Section 630 prevents the Executive Branch from enforcing certain terms in the nondisclosure forms, including those identified in subsections 3 and 4, during the funding ban. Their request does not require the Court to pass on the extent of employees' underlying rights to give information to Congress without seeking prior permission from their superiors, but only to ensure that employees know that the forms do not alter those rights. Moreover, appellee Garfinkel has disavowed any intent to displace existing laws through the nondisclosure forms in his most recent regulation, which expressly states that SF 189 and his newest form "do not supersede . . . any other laws of the United States." 53 Fed. Reg. at 38,279 (to be codified at 32

[11]To assure proper security, the Senate has established strict controls for classified information, including restrictions on unauthorized disclosures, and many committees, including the intelligence committees of both Houses, have long operated under similar rules. Office of Senate Security, *Senate Security Manual* (Oct. 1988); *see, e.g.*, S. Res. 400, 94th Cong., 2d Sess. (1976); H. Res. 658, 95th Cong., 1st Sess. (1977).

C.F.R. § 2003.20(g)). Since at least one of the appellees thereby concedes that statutory rights, including Sections 7211 and 1034 which protect employees' rights to communicate with Congress, are unaffected by the nondisclosure agreements, it would hardly impair the Executive Branch to inform all signatories to the forms of that limitation.

Nonetheless, in response to this rather modest request for relief, appellees have claimed that it is unconstitutional for Congress to control in any way the limitations that the Executive Branch has sought to impose on employees who wish to make disclosures of information to Congress. In particular, appellees contend that Congress cannot stop them from requiring three million employees to seek prior authorization before making *any* disclosure of classified or "classifiable" information to Congress, even where that requirement violates some other law or right. However, requiring employees to identify themselves as likely whistleblowers by seeking such permission, especially where their superiors have improperly classified information to conceal government waste or illegal conduct, will almost certainly curtail the exercise of existing rights to communicate with Members of Congress. *See Talley v. California*, 362 U.S. 60, 64-65 (1960) (confidentiality required to avoid curtailing speech); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (same); 5 U.S.C. § 1206(b)(1) (preserving confidentiality of whistleblowers).

The sheer breadth of the Executive Branch's claim of power threatens the balance struck by history, under which Members of Congress have been considered to be both cleared and authorized by virtue of their elected positions to receive classified information. It is also an attack on numerous statutes and time-honored rights of Congress to obtain Executive Branch information, as well as on Congress' authority to provide for greater protections than afforded by the Constitution. *See Brown v. Glines*, 444 U.S. at 358-61 (although prior authorization requirement for solicita-

tion activities did not constitute unlawful prior restraint, Court looked to 10 U.S.C. § 1034 for further safeguards which it found applied to individual communications with Congress but not collective petitions). Neither appellees nor the district court cited any case upholding such a sweeping claim, and the authorities on which they rely offer no support for a constitutional bar to statutes, like Section 630, which regulate Executive Branch restrictions on congressional access to national security information.

Because the Executive Branch has provided absolutely no factual support for its broad claim of impairment, the Court should decline, as it did in *Nixon v. GSA*, to decide whether some hypothetical application of the statute might conceivably raise a constitutional question. 433 U.S. at 434-35, 438, 444-45. It would be particularly inappropriate for the Court to delimit the parameters of the rights protected by Section 630 here because this case does not concern a specific disclosure made by a federal employee to a Member of Congress. *See Barenblatt v. United States*, 360 U.S. at 112 ("[t]he congressional power of inquiry, its range and scope, and an individual's duty in relation to it . . . are to be judged in the concrete, not on the basis of abstractions"); *see also* Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1427-29 (1974) (highlighting political sensitivity and unseemliness of courts deciding whether Congress needs access to Executive Branch information and whether congressional disclosure will create a security risk). Rather than decide the respective rights of Congress and the Executive Branch in a vacuum, the Court should leave resolution of future disputes to political negotiations between the branches or to judicial determinations in concrete settings where political accommodation does not fully resolve the conflict. *See United States v. AT&T*, 551 F.2d 384, 394 (D.C. Cir. 1976) (court urged negotiated solution to clash between Congress and Executive over Congress' access to documents pertaining to warrantless wiretaps);

United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977) (on remand court prescribed compromise procedure which facilitated settlement). All the Court needs to decide here is that the district court erred in its blanket condemnation of subsections 3 and 4 and that a notice of the type requested by appellants would not unduly hamper the Executive Branch's ability to function.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision and remand the case with directions for the district court to issue an order requiring appellees to give federal employees notice of Section 630's restrictions and grant such other relief as is necessary and proper to remedy appellees' noncompliance.

Respectfully submitted,

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ADDENDUM

Section 619 of the Treasury, Postal Service and General Government Appropriations Act of 1989, Pub. L. No. 100-440, 102 Stat. 1721, 1756 (1988), which is identical to Section 630 of the Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329-432 (1987), except for the year in which it is in effect, provides:

> No funds appropriated in this or any other Act for fiscal year 1989 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:
>
> (1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination;
>
> (2) contains the term "classifiable";
>
> (3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;
>
> (4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;

(5 imposes any obligations or invokes any remedies inconsistent with statutory law:

Provided, That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)-(5) of this section.

Supreme Court, U.S.
FILED
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CLERK

No. 87-2127

In the Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION, ET AL., APPELLANTS

v.

STEVEN GARFINKEL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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QUESTIONS PRESENTED

Section 630 of the Treasury, Postal Service and General Appropriations Act for fiscal year 1988 provides that no funds appropriated for that year may be expended for the implementation or enforcement of any policy, form or agreement concerning the unauthorized disclosure of classified information if the policy, form or agreement: (a) contains the term "classifiable" or concerns information other than that which is marked classified or is known by the employee to be classified or to be in the process of a classification determination, or (b) obstructs (by requirement of prior authorization or limitation of disclosure) the right of an individual to petition or communicate with Members of Congress in a secure manner as provided by the procedures of Congress or interferes with the right of Congress to obtain Executive Branch information. Consistent with the first of these requirements, appellees have deleted the word "classifiable" from all forms.

The questions presented are:

1. Whether the remaining requirements of Section 630 unconstitutionally interfere with the President's authority as Commander in Chief and head of the Executive Branch to protect national security information and to supervise employees who have responsibilities in the area of national security.

2. Whether appellants' remaining claims under Section 630 are ripe for judicial review and suitable for the award of equitable relief.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement:	
A. The legal framework for the protection of national security information in the Executive Branch	2
B. The proceedings in this case	10
C. Subsequent developments	13
Summary of argument	15
Argument:	
I. The Constitution vests the President with the primary responsibility and power to protect national security information within the Executive Branch	17
A. Complete authority over national defense and foreign affairs within the Executive Branch is vested directly in the President, by virtue of his status as Commander in Chief, sole organ of the Nation in its external relations, and head of the Executive Branch	18
B. The President's constitutional authority over national defense and foreign relations requires that he have control over national security information in the Executive Branch	24
II. Section 630 is unconstitutional to the extent it is interpreted to deprive the President of his ability to prevent negligent disclosures of national security information and to deprive the President of control over dissemination of such information, including to members of Congress	28
A. The principal concern that led to the enactment of Section 630 has been met by the deletion of the word "classifiable" from all of the challenged agreements	29

Page

B. Section 630 cannot constitutionally be applied to deprive the President of his authority to prevent the negligent release of national security information by his subordinates 34

C. Section 630 cannot constitutionally be applied to divest the President of all control over the decision whether to disclose national security information to Congress 41

Conclusion 51

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Aptheker v. *Secretary of State*, 378 U.S. 500 (1964) 18
Bowsher v. *Synar*, 478 U.S. 714 (1986) 20, 23
Brown v. *Glines*, 444 U.S. 348 (1980) 39
Buckley v. *Valeo*, 424 U.S. 1 (1976) 19
Bush v. *Lucas*, 462 U.S. 367 (1983) 50
Cafeteria & Restaurant Workers Union, Local 473 v. *McElroy*, 367 U.S. 886 (1961) 26
Cannon v. *University of Chicago*, 441 U.S. 677 (1979) ... 33
Carlucci v. *Doe*, No. 87-751 (Dec. 6, 1988) 37
CFTC v. *Schor*, 478 U.S. 833 (1986) 23
Chicago & Southern Air Lines, Inc. v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948) 22, 25
CIA v. *Sims*, 471 U.S. 159 (1985) 4, 24, 25
Cole v. *Young*, 351 U.S. 536 (1956) 28, 36, 37
Connick v. *Myers*, 461 U.S. 138 (1983) 39, 50
CSC v. *Letter Carriers*, 413 U.S. 548 (1973) 38
Department of the Navy v. *Egan*, No. 86-1552 (Feb. 23, 1988) 2, 24, 26, 28, 33, 35, 36, 37
EPA v. *Mink*, 410 U.S. 73 (1973) 26
Haig v. *Agee*, 453 U.S. 280 (1981) 18
Humphrey's Executor v. *United States*, 295 U.S. 602 (1935) 20
INS v. *Chadha*, 462 U.S. 919 (1983) 23, 43

Cases – Continued: Page

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International Union, United Automobile Workers of America v. *Brock*, 477 U.S. 274 (1986) 32
Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) 49
Kleppe v. *New Mexico*, 426 U.S. 529 (1976) 33
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 20, 25
McGehee v. *Casey*, 718 F.2d 1137 (D.C. Cir. 1983) 39
McGrain v. *Daugherty*, 273 U.S. 135 (1927) 49
Mistretta v. *United States*, No. 87-7028 (Jan. 19, 1989) ... 23, 43
Morrison v. *Olson*, No. 87-1279 (June 29, 1988) 21, 23, 37
Myers v. *United States*, 272 U.S. 52 (1926) 19, 20, 21
New York Times Co. v. *United States*, 403 U.S. 713 (1971) 24, 28
Nixon v. *Administrator of General Services*, 433 U.S. 425 (1977) 23, 27, 43
Nixon v. *Fitzgerald*, 457 U.S. 731 (1982) 19
Parker v. *Levy*, 417 U.S. 733 (1974) 39
Public Affairs Assocs., Inc. v. *Rickover*, 369 U.S. 111 (1962) 33
Rankin v. *McPherson*, No. 85-2068 (June 24, 1987) 39
Sherbert v. *Verner*, 373 U.S. 398 (1963) 49
Snepp v. *United States*, 444 U.S. 507 (1980) 4, 5, 24, 28, 38, 39, 47
Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984) 50
Touhy v. *Ragen*, 340 U.S. 462 (1951) 49, 50
Totten v. *United States*, 92 U.S. 105 (1875) 24
United States v. *AT & T*, 567 F.2d 121 (D.C. Cir. 1977) .. 45
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) 18, 19, 22, 24, 25, 44
United States v. *Lovett*, 328 U.S. 303 (1946) 49
United States v. *Marchetti*, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972) 38, 39
United States v. *Nixon*, 418 U.S. 683 (1974) 35, 45
United States v. *Pink*, 315 U.S. 203 (1942) 18-19
United States v. *Reynolds*, 345 U.S. 1 (1953) 24, 45
United States v. *Robel*, 389 U.S. 258 (1967) 24
United States v. *United States District Court*, 407 U.S. 297 (1972) 18

Cases—Continued: Page

Watkins v. *United States*, 354 U.S. 178 (1957) 49
Webster v. *Doe*, No. 86-1294 (June 15, 1988) 4, 28, 33, 37, 38
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 23

Constitution, statutes, regulations and rules:

U.S. Const.:
Art. I:
§ 8:
Cl. 1 22
Cl. 8 (Copyright Clause) 12
Cls. 11-14 22
§ 9, Cl. 7 22
Art. II 11, 35
§ 1 ..... 18, 19
Cl. 8 ..... 15, 22
§ 2 23
Cl. 2 ..... 18, 22
§ 3 ..... 18, 19, 36, 45
Amend. I 13, 14, 39, 48, 49, 50

Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28 20
Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49-50 20
Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq*:
5 U.S.C. 1206(c)(1)(A) 12, 50
5 U.S.C. 2302(b)(8) 50
5 U.S.C. 2302(b)(8)(A) 12, 50
5 U.S.C. 2302(b)(8)(B) 50
Classified Information Procedures Act, 18 U.S.C. App. at 594 ..... 26, 33
Code of Ethics for Governments Service, Pub. L. No. 96-303, § 3, 94 Stat. 855 12
Freedom of Information Act, 5 U.S.C. 552 ..... 12, 26
5 U.S.C. 552(b)(1) 26
Government in the Sunshine Act, 5 U.S.C. 552(b) 26
Intelligence Identities Protection Act:
50 U.S.C. 421 26
50 U.S.C. 421(a) 37
50 U.S.C. 421(b) 37

Constitution, statutes, regulations and rules – Continued: Page

National Security Act of 1947, ch. 343, 61 Stat. 495 4
50 U.S.C. 401 21
50 U.S.C. 401 note 2
50 U.S.C. 402 (1982 & Supp. IV, 1986) 21
50 U.S.C. 403 21
50 U.S.C. 403(c) 37
50 U.S.C. 403(d)(3)(§ 102(d)(3)) 4
50 U.S.C. 413 46

Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2107 note 27

Privacy Act, 5 U.S.C. 552a 26

Treasury, Postal Service and General Appropriations Act, 1988 (as enacted by Continuing Appropriations Act, 1988, Pub. L. No. 100-202, § 101(m), 101 Stat. 1329-390) 8
§ 630, 101 Stat. 1329-432 ..... *passim*
§ 630(1), 101 Stat. 1329-432 ..... *passim*
§ 630(1)-(5), 101 Stat. 1329-432 10
§ 630(2), 101 Stat. 1329-432 ..... 9, 16, 29
§ 630(3), 101 Stat. 1329-432 ..... *passim*
§ 630(3)-(5), 101 Stat. 1329-432 12
§ 630(4), 101 Stat. 1329-432 ..... *passim*
§ 630(5), 101 Stat. 1329-432 ..... *passim*

Treasury, Postal Service and General Appropriations Act, 1989, Pub. L. No. 100-440, 102 Stat. 1721 15
§ 619, 102 Stat. 1756 ..... 15, 29

Pub. L. No. 100-456, § 846, 102 Stat. 2027 50

5 U.S.C. 7211 ..... 13, 17, 48, 50

5 U.S.C. 7532 37

10 U.S.C. 133(b) (1982 & Supp. IV 1986) 21

10 U.S.C. 1034 (1982 & Supp. IV 1986) 50

18 U.S.C. 798 *et seq* 26, 37

22 U.S.C. 2656 21

50 U.S.C. 831 37

50 U.S.C. 832(b) 37

Constitution, statutes, regulations and rules – Continued: Page

Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953 Comp.) 37
Section 2, 3 C.F.R. 936-937 (1949-1953 Comp.) 37
Section 7, 3 C.F.R. 938 (1949-1953 Comp.) 37

Exec. Order No. 10,501, 3 C.F.R. 979 (1949-1953 Comp.) 2

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Exec. Order No. 12,065, 3 C.F.R. 190 (1978 Comp.) 2

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32 C.F.R. 1080 (1943-1948 Comp.) 4

32 C.F.R.:
Pts. 2001-2003 4
Section 2003.20 14
Section 2003.20(a) 14
Section 2003.20(b) 14
Section 2003.20(h)(1) 14
Section 2003.20(h)(1)(i) 8, 14
Section 2003.20(h)(3) 14, 40

H.R. Rule XLVIII, § 7 48

Miscellaneous:

1 Annals of Cong. 512 (1789) 20

10 Annals of Cong. 613 (1800) 19

16 Annals of Cong. 336 (1807) 44

Classified Information Nondisclosure Agreements: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service, 100th Cong., 1st Sess. (1987) 30, 34

133 Cong. Rec. H11, 999 (daily ed. Dec. 21, 1987) 8

135 Cong. Rec. S1161-S1162 (daily ed. Feb. 2, 1989) 32

Miscellaneous – Continued: Page

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p. 28,802 ..... 7, 30
p. 29,793 30
p. 48,367 ..... 8, 30

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The Federalist (C. Rossiter ed. 1961):
No. 64 (Jay) 25, 43
No. 68 (Hamilton) 19
No. 70 (Hamilton) 19
No. 72 (Hamilton) 20
No. 74 (Hamilton) 19
No. 75 (Hamilton) 19, 43

Miscellaneous – Continued: Page

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24 Weekly Comp. Pres. Docs. 1189 (Sept. 23, 1988) 15

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2127

AMERICAN FOREIGN SERVICE ASSOCIATION, ET AL., APPELLANTS

v.

STEVEN GARFINKEL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

OPINIONS BELOW

The opinion of the district court dated May 27, 1988 (J.S. App. 1a-36a) is reported at 688 F. Supp. 671. The opinion and judgment of the district court in the companion cases of *NFFE* v. *United States* and *AFGE* v. *Garfinkel,* dated July 29, 1988 (Mot. to Aff. App. 4a-24a; J.A. 61-63), and the order of the district court on the defendants' motion to alter or amend the judgment in those cases (J.A. 64-65), are reported at 695 F. Supp. 1196.

JURISDICTION

The judgment of the district court (J.S. App. 37a-38a) was entered on May 27, 1988. The notice of appeal to this Court was filed on June 3, 1988 (J.S. App. 39a-40a), and the jurisdictional statement was docketed on June 28, 1988. The Court noted probable jurisdiction on October 31, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution and Section 630 of the Treasury, Postal Service and General Government Appropriations Act, 1988 (as enacted by Section 101(m) of the Continuing Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-432) are reproduced at App., *infra*, 1a-3a. Section 619 of the Treasury, Postal Service and General Government Appropriations Act, 1989, Pub. L. No. 100-440, 102 Stat. 1756, which is identical to Section 630 of the 1988 Act, is set forth in the addendum to the appellants' brief.

STATEMENT

A. The Legal Framework For The Protection Of National Security Information In The Executive Branch

1. The President has the authority and responsibility under Article II of the Constitution to classify information concerning the national defense and foreign relations of the United States, to decide whether an individual is sufficiently trustworthy to be granted access to such information, and to determine whether an individual has a need to know a particular item of such information on a particular occasion. This authority "exists quite apart from any explicit congressional grant." *Department of the Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988), slip op. 8.

The Executive Branch has engaged in systematic efforts since World War I to protect national security information. Since World War II, these efforts have been formalized in a series of executive orders that seek to ensure uniformity and proper classification throughout the Executive Branch. See Exec. Order No. 10,290, 3 C.F.R. 789 (1949-1953 Comp.); Exec. Order No. 10,501, 3 C.F.R. 979 (1949-1953 Comp.); Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975 Comp.); Exec. Order No. 12,065, 3 C.F.R. 190 (1978 Comp.). The most recent such directive, Executive Order No. 12,356, was issued by President Reagan in 1982. 47 Fed. Reg. 14,874, 3 C.F.R. 166 (1982 Comp.); 50 U.S.C. 401 note. See *Egan*, slip op. 9.

Executive Order No. 12,356 provides for three levels of classification – Top Secret, Secret and Confidential – based upon the degree of the harm to the national security that could result

from unauthorized disclosure (§ 1.1(a)).[1] The Executive Order also describes categories of information that may be classified[2] and prohibits classification to conceal violations of the law or administrative inefficiency or to prevent embarrassment (§ 1.6(a) and (b)). If there is reasonable doubt about the need to classify information, it must be safeguarded as if it is classified pending a classification determination, which must be made within 30 days (§§ 1.1(c), 1.2(e)). When classified information exists in a document or other concrete format, markings are ordinarily used to indicate its classified status (§ 1.5).[3]

In order to safeguard national security information, Executive Order No. 12,356 provides that access must be limited as a general matter to those individuals who have been determined to be trustworthy, and that access to any particular item of information may be granted only where it "is essential to the accomplishment of lawful and authorized Government purposes" (§ 4.1(a))—*i.e.*, where the individual has a "need to know" that information. Each agency is required to establish controls to ensure that classified information is used, stored, reproduced,

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[1] The designations Top Secret, Secret, and Confidential apply to information whose unauthorized disclosure could be expected to cause, respectively, "exceptionally grave damage," "serious damage," and "damage" to the national security (§§ 1.1(a)(1)-(3)).

[2] Section 1.3(a) provides that information shall be considered for classification if it concerns (1) "military plans, weapons, or operations;" (2) "the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security;" (3) "foreign government information;" (4) "intelligence activities (including special activities), or intelligence sources or methods;" (5) "foreign relations or foreign activities of the United States;" (6) scientific, technological, or economic matters relating to the national security;" (7) "programs for safeguarding nuclear materials or facilities;" (8) "cryptology;" and (9) "a confidential source."

[3] Not all classified information is marked. Raw intelligence or an agent's report may not bear classification markings until it is processed, and an employee's or former employee's manuscript that contains classified information would not bear classification markings until it is reviewed pursuant to a prepublication agreement; in each case, however, the information is classified. See *Prepublication Review and Secrecy Agreements: Hearings Before the Subcomm. on Oversight of the House Permanent Select Comm. on Intelligence*, 96th Cong., 2d Sess. 39-41 (1980).

transmitted and destroyed under conditions that will provide adequate protection and prevent unauthorized access (§ 4.1(b)). Dissemination outside the Executive Branch is prohibited except "under conditions that ensure that the information will be given protection equivalent to that afforded within the executive branch" (§ 4.1(c)). All persons who are granted access to classified information are subject to appropriate sanctions if they "knowingly, willfully, or negligently" disclose it to unauthorized persons (§ 5.4(b)(1)). In the case of government officers and employees, those sanctions may include reprimand, loss or denial of access to classified information, suspension without pay, and removal from employment (§ 5.4(c)).

The National Security Council is responsible for establishing overall policy with respect to classified information, but the Director of the Information Security Oversight Office (ISOO) in the General Services Administration is responsible for implementing the program and monitoring compliance (§ 5.1). The Director of ISOO is authorized, *inter alia*, "to prescribe, after consultation with affected agencies, standard forms that will promote the implementation of the information security program" (§ 5.2(b)(7)). See also 32 C.F.R. Pts. 2001-2003.

2. In addition to the foregoing measures instituted by the President pursuant to his inherent constitutional authority, the National Security Act of 1947, ch. 343, 61 Stat. 495, provides that the Director of Central Intelligence (DCI) "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure" (§ 102(d)(3), 50 U.S.C. 403(d)(3)). See *Webster* v. *Doe*, No. 86-1294 (June 15, 1988), slip op. 7-8; *CIA* v. *Sims*, 471 U.S. 159, 170-173 (1985); *Snepp* v. *United States*, 444 U.S. 507, 509 (1980).[4] The DCI has long required individuals who are granted access to information concerning the Central Intelligence Agency (CIA) or its intelligence sources and methods to sign a formal agreement in which they promise not

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[4] The National Security Act merely restates the broad authority previously granted to the DCI by the President pursuant to his inherent constitutional authority. Presidential Directive of Jan. 22, 1946, 3 C.F.R. 1080 (1943-1948 Comp.); see *CIA* v. *Sims*, 471 U.S. at 172-173.

to disclose such information without prior authorization and to submit any material relating to such information for prepublication review. In *Snepp*, the Court found one such agreement to be an "entirely appropriate" exercise of the DCI's authority to protect intelligence sources and methods, and it sustained the agreement against a First Amendment challenge (444 U.S. at 509 n.3).

In 1981, the DCI adopted Standard Form (SF) 4193 (J.A. 19-25), which governs access to Sensitive Compartmented Information (SCI) (J.S. App. 5a n.4). SCI is a subset of information involving intelligence sources and methods that consists of "data about sophisticated technical systems for collecting intelligence and the information collected by those systems." DCI Security Committee, *Sensitive Compartmented Information: Characteristics and Security Requirements* 1 (June 1984) (J.A. 46). Because SCI is extremely vulnerable to countermeasures and compromise, "no risk is tolerable where SCI is involved" (J.A. 49). More stringent standards are accordingly applied in determining who may have access to SCI, and individuals who have been granted access to Top Secret information nonetheless may be denied access to SCI (J.A. 48-51). In a declaration filed in the court below, DCI William Webster explained that Form 4193 serves to underscore the personal obligation undertaken by the signatory, which prevents both inadvertent and deliberate disclosures, and to facilitate the tracking of persons who have had access to the SCI (Webster Decl. ¶¶ 3-4, 8-11 (J.A. 40-41, 43-44)). These special protections for SCI are in accordance with the authorization in Section 4.2 of Executive Order No. 12,356 for the DCI to establish special access programs governing "particularly sensitive" information pertaining to intelligence sources and methods (Webster Decl. ¶ 3 (J.A. 40-41)).

As originally adopted in 1981, Form 4193 described SCI as information that "involves or derives from intelligence sources or methods and is classified or classifiable under the standards of Executive Order 12,065 [the predecessor to Executive Order No. 12,356] or other Executive order or statute" (SF 4193 ¶ 1 (J.A. 19)). Any person who signed Form 4193 acknowledged that "direct or indirect unauthorized disclosure, unauthorized reten-

tion, or negligent handling of SCI * * * could cause irreparable injury to the United States or be used to advantage by a foreign nation" (*id.* ¶ 3 (J.A. 19)). The signatory accordingly promised, in consideration of his being granted access to SCI, never to divulge SCI to anyone who is not authorized to receive it without the prior written authorization of the responsible agency (*id.* ¶¶ 1, 3 (J.A. 19, 20)).[5] Finally, the signatory acknowledged that any breach of the agreement could result in termination of his access to SCI, removal from a position of special confidence and trust requiring such access, or loss of employment with any agency that granted him access to SCI (*id.* ¶ 7 (J.A. 21)).

3. In 1982, in response to numerous improper disclosures, President Reagan established a task force to recommend additional measures for the protection of national security information. The task force's recommendations were approved by the National Security Council and were adopted by the President in National Security Decision Directive (NSDD) 84 (Mar. 11, 1983) (J.A. 11-14). NSDD 84 states that preventing unlawful disclosures of classified information is "a matter of grave concern and high priority," and it directs each Executive Branch agency to require any person who is granted access to classified information to sign a nondisclosure agreement as a condition of such access (¶ 1.a. (J.A. 11)). In addition, NSDD 84 requires the Director of ISOO to establish a standard nondisclosure form for use throughout the Executive Branch for classified information other than SCI (¶ 1.c. (J.A. 12)).

Pursuant to the latter mandate of NSDD 84, the Director of ISOO adopted Standard Form (SF) 189 (J.A. 15-18). As originally adopted in 1983, SF 189 defined the term "classified information" as "information that is either classified or classifiable under the standards of Executive Order 12,356 or under any other Executive Order or statute that prohibits the unauthorized disclosure of information in the interest of national security"

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[5] The signatory also agreed to submit for security review all materials intended for publication that contain or purport to contain SCI or information relating to or derived from SCI (*id.* ¶ 4 (J.A. 20)). The prepublication review provisions of the forms are not at issue here.

(¶ 1 (J.A. 15)). Like the DCI's Form 4193, SF 189 states that the signatory has been advised and is aware that "direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of classified information * * * could cause irreparable injury to the United States or could be used to advantage by a foreign nation." The signatory accordingly promised never to divulge such information unless he has officially verified that the recipient has been properly authorized by the responsible agency (¶ 3 (J.A. 15)). As under Form 4193, the signatory also acknowledged that a breach of the agreement could result in termination of his security clearances, loss of his position of confidence and trust, or loss of employment with the agency that granted him access to the information (¶ 4 (J.A. 16)).

4. On August 17, 1987, the National Federation of Federal Employees filed an action in the United States District Court for the District of Columbia seeking to enjoin the use of SF 189 and any other form that used the word "classifiable" to describe information that may not be disclosed. *NFFE* v. *United States*, Civ. No. 87-2284-OG. NFFE contended, *inter alia*, that use of the term "classifiable" violated the First Amendment because it is ambiguous and overbroad and would permit an agency to classify information after the employee sought to disclose it or had already done so. The American Federation of Government Employees and three individuals filed a similar suit in the same court on September 1, 1987, challenging the term "classifiable" in both SF 189 and Form 4193. *AFGE* v. *Garfinkel*, Civ. No. 87-2412-OG. See J.S. App. 2a n.1.

On December 21, 1987, while the *NFFE* and *AFGE* suits were pending, the Director of ISOO published a regulation in the *Federal Register* to clarify the meaning of the term "classifiable information" as used in SF 189.[6] That regulation stated that the term "classifiable information" means

> (a) Unmarked *classified* information, including oral communications; and (b) *unclassified* information that meets

[6] The Director of ISOO previously had sought to clarify the meaning of the term "classifiable information" in notices published on August 3 and August 11, 1987, before the *NFFE* and *AFGE* suits were filed. See 52 Fed. Reg. 28,802, 29,793 (1987).

> the standards for classification and is in the process of a classification determination. "Classifiable information" does *not* refer to currently unclassified information that may be subject to possible classification at some future date, but is not currently in the process of a classification determination. Therefore, the only circumstances under which a party to SF 189 might violate its terms by disclosing *unclassified* information are when a party knows, or reasonably should know, that such information is in the process of a classification determination * * *.

32 C.F.R 2003.20(h)(1)(i) (emphasis in original), as added, 52 Fed. Reg. 48,367 (1987).

5. One day after the Director of ISOO published the clarification of the term "classifiable," Congress passed the 450-page, government-wide Continuing Appropriations Act for fiscal year 1988, Pub. L. No. 100-202, 101 Stat. 1329. Section 101(m) of that Act contained the Treasury, Postal Service and General Government Appropriations Act, 1988, 101 Stat. 1329-390. Section 630 of the latter Act, 101 Stat. 1329-432 (App., *infra*, 1a-2a), is a rider, added at the last minute (133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987)), which purports to impose certain restrictions on the ability of Executive Branch agencies to protect classified information.

Section 630 provides that no funds appropriated in any Act for fiscal year 1988 "may be used to implement or enforce the agreements in Standard Forms 189 or 4193 of the Government or any other nondisclosure policy, form or agreement" that has certain characteristics identified in five succeeding subsections.[7] The first two of these subsections provide that appropriated funds may not be used to implement or enforce a policy, form or agreement that "contains the term 'classifiable' " (¶ (2)) or that "concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in

[7] Although Section 630 uses the term "Standard Form" to refer to both SF 189 and Form 4193, the latter is actually not a standard form subject to generally applicable requirements; it was issued pursuant to the special authority of the DCI.

the process of a classification determination" (¶ (1)). The latter limitations parallel the categories of information to which SF 189 was limited in any event by virtue of the clarification published by the Director of ISOO on December 21, 1987. See pages 7-8, *supra*. Subsections (3) and (4) of Section 630 prohibit the use of funds for a nondisclosure policy, form or agreement that "obstructs * * * the right of any individual to petition or communicate with Members of Congress" or "interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress." Subsection (5) provides that appropriated funds may not be used for any policy, form or agreement that "imposes any obligations or invokes any remedies inconsistent with statutory law."

6. The responsible Executive Branch officials promptly took steps to accommodate certain of the concerns reflected in Section 630. Appellee Garfinkel, the Director of ISOO, temporarily suspended further implementation of SF 189 pending receipt of advice from the Attorney General (Garfinkel Aff. ¶ 2 (Feb. 8, 1988) (J.A. 28-29)). He also directed agencies to notify affected employees that any SF 189 executed after December 22, 1987 would be treated as voidable at the employee's request (¶ 3 (J.A. 29)).

On behalf of the DCI, Lt. General Edward J. Heinz, the Director of the Intelligence Community Staff, issued instructions stating that Form 4193 was only to be used when accompanied by a special addendum that read:

> The obligations imposed by this Agreement shall be implemented and enforced in a manner consistent with the section entitled "Employee Disclosure Agreements" contained in P.L. 100-202, Continuing Appropriations for Fiscal Year 1988, 22 December 1987, and other applicable law.

Heinz Decl. ¶ 4 (Feb. 9, 1988) (J.A. 26). Then, on March 18, 1988, the DCI replaced Form 4193 with Form 4355. Second Heinz Decl. ¶ 3 (Mar. 24, 1988) (J.A. 52) & Exh. A (J.A. 54-58). Consistent with subsection (2) of Section 630, Form 4355 does not use the word "classifiable" in describing the infor-

mation to which the signatory's nondisclosure obligation applies. Instead, tracking subsection (1) of Section 630, Form 4355 describes SCI as information that "involves or derives from intelligence sources or methods and is classified or is in the process of a classification determination under the standards of Executive Order 12356 or other Executive order or statute" (¶ 1 (J.A. 54)).[8] A signatory to Form 4355 agrees that he will never divulge anything marked SCI or that he knows to be SCI to anyone not authorized to receive it or without prior authorization, and that it is his responsibility to consult with appropriate officials in order to ensure that he knows whether information that he has reason to believe might be SCI (or might be related to or derived from SCI) is considered by the agency concerned to be SCI (¶ 3 (J.A. 55)). Instructions issued by Lt. Gen. Heinz provide that agencies may permit persons who signed Form 4193 after December 21, 1987, to sign a Form 4355 in its place. Second Heinz Decl., Exh. B.

B. The Proceedings In This Case

1. On February 19, 1988, one month before the DCI issued Form 4355, the American Foreign Service Association (AFSA) and seven Members of Congress, appellants herein, filed this action challenging SF 189 and Form 4193 on the ground that they violate Section 630. Appellants sought declaratory and injunctive relief that would (i) bar the Secretary of State from requiring State Department employees to execute Form 4193 (even with the addendum quoted above) during the remainder of fiscal year 1988, (ii) compel the Secretary of State to treat all Form 4193 agreements signed after December 22, 1987, as void, (iii) direct appellees Webster and Garfinkel to prohibit federal agencies from requiring federal officers and employees to sign Form 4193 during the remainder of fiscal year 1988, and (iv) direct appellees Webster and Garfinkel to require all federal agencies to treat all SF 189 and Form 4193 agreements executed after December 22, 1987, as void and to notify the signatories

[8] The term "classified" in Form 4355 refers to both marked and unmarked classified information.

accordingly. Complaint 7-8 (J.A. 9-10). The district court consolidated this case with the *AFGE* and *NFFE* cases for all purposes (J.S. App. 2a n.1; J.A. 2), and the plaintiffs in *AFGE* and *NFFE* amended their complaints to allege similar claims under Section 630.

2. The district court considered the consolidated cases in two steps. First, in the decision at issue here (J.S. App. 1a-36a), rendered on May 27, 1988, the court addressed the claim presented in all three cases under Section 630. The court did not actually decide whether the challenged forms were inconsistent with Section 630; instead, it assumed for purposes of its decision that appellees had violated Section 630, noting by way of explanation only that the DCI continued to use Form 4193 after December 22, 1987 (albeit with the addendum) until he adopted Form 4355 in March 1988 (J.S. App. 22a-23a n.16).[9] The court nevertheless denied appellants any relief because it held that Section 630 unconstitutionally interferes with the President's inherent Article II power to protect national security information (J.S. App. 22a-27a).[10]

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[9] The DCI interpreted Section 630 not to bar Form 4193 altogether, but only to preclude implementation or enforcement of those features of Form 4193 that may be inconsistent with Subsections (1)-(5) of Section 630.

[10] As a threshold matter, the court held that the appellant Members of Congress lack standing to challenge the form agreements under Section 630 because they can seek relief by participating in the legislative process (J.S. App. 13a-14a). The court found, however, that appellant AFSA and the unions in *NFFE* and *AFGE* have standing to challenge the agreements under Section 630 because they alleged that some of their individual members had been chilled in the exercise of their First Amendment rights as a result of the implementation and threatened enforcement of those agreements (*id.* at 14a-18a; see also *id.* at 20a-22a), and that the three individual plaintiffs in *AFGE* who had signed forms prior to December 22, 1987, also had standing to object to the forms under the subsequently enacted Section 630 (*id.* at 18a-19a). Although appellants listed as a question presented in their Jurisdictional Statement (at i) the question whether the district court had properly denied standing to the individual Members of Congress, they have omitted that issue from the questions presented in their merits brief (at i) and they have not addressed it in the body of either the Jurisdictional Statement or their brief on the merits.

In the district court's view, although Congress is not precluded from "activity relating to national security information" (J.S. App. 23a), Section 630 "impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations" (J.S. App. 27a). The court found Subsections (3)-(5) of Section 630 particularly objectionable because those provisions, which govern communications to Congress by federal employees and bar enforcement of agreements that impose obligations or invoke remedies inconsistent with statutory law, would restrict the President to insuring "the secrecy of national security information only by those means authorized by Congress" (J.S. App. 27a). Accordingly, the court concluded, "[w]herever may be drawn the line between the political branches in the area of regulating access to national security information, section 630 surely falls within the territory where it is not welcome" (*ibid.*). The court therefore granted summary judgment in favor of the appellee federal officials in this case, since appellants based their challenge to SF 189 and Form 4193 only on Section 630, and it dismissed the corresponding counts under Section 630 in the *NFFE* and *AFGE* complaints (J.S. App. 27a-28a, 37a-38a).[11]

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[11] The district court also rejected several additional claims advanced only by the plaintiffs in *NFFE* and *AFGE*. First, the court held that the nondisclosure agreements do not violate the whistleblower provision of the Civil Service Reform Act, because that provision excepts from protection any disclosure of information that is " 'specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs' " (J.S. App. 30a-31a, quoting 5 U.S.C. 2302(b)(8)(A)) and because enforcement of the whistleblower provision is in any event committed to the Special Counsel of the Merit Systems Protection Board, rather than a private right of action (J.S. App. 31a, citing 5 U.S.C. 1206(c)(1)(A)). Second, the court rejected as frivolous the claims that the agreements violate an uncodified Code of Ethics for Government Service, Pub. L. No. 96-303, § 3, 94 Stat. 855 (J.S. App. 31a-32a), the Copyright Clause of the Constitution, Art. I, § 8, Cl. 8 (J.S. App. 33a), and the Freedom of Information Act, 5 U.S.C. 552 (J.S. App. 34a). Third, the court dismissed for failure to state a claim the contention that Form 4193 violates NSDD 84 (J.S. App. 32a). Fourth, the court ruled that differences between SF 189 and a form used for government-contractor employees are rational (J.S. App. 28a-30a).

C. Subsequent Developments

1. On July 29, 1988, after the notice of direct appeal to this Court was filed in the instant case, the district court rendered its final decision in *NFFE* and *AFGE*, holding that the term "classifiable" as used in SF 189 and Form 4193 is not impermissibly vague under the First Amendment provided its scope is clarified in accordance with the definition published by the Director of ISOO on December 21, 1987 (Mot. to Aff. App. 10a-20a). However, the court ordered that SF 189 and Form 4193 could not be enforced with respect to "classifiable" information unless employees who had signed those forms were individually informed of the published clarification or the term was deleted from their agreements (*id.* at 20a).

The district court also rejected the contention by the *NFFE* and *AFGE* plaintiffs that the regulation published by the Director of ISOO in December 1987 violates the First Amendment because it bars negligent disclosures and disclosures of information that the employee should know is classified or in the process of a classification determination. The court explained that "[t]he reasonable person standard is one to which people are held in all their activities, and it does not become unconstitutionally vague simply because First Amendment rights are involved" (Mot. to Aff. App. 19a). The court likewise rejected the claim by the *AFGE* plaintiffs that the agreements violate 5 U.S.C. 7211 – which prohibits interference with the right of employees to petition Congress or a Member of Congress or to furnish information to a House, committee or Member of Congress – because the plaintiffs failed to allege that they had disclosed or intended to disclose classified or classifiable information to Congress and been threatened with enforcement of the nondisclosure agreement as a result (Mot. to Aff. App. 21a-22a).[12]

2. On September 29, 1988, the Director of ISOO published regulations setting forth the manner in which he would implement the final judgment in the *NFFE* and *AFGE* cases. 53 Fed.

[12] The *NFFE* and *AFGE* plaintiffs have appealed the final judgment in those cases to the Court of Appeals for the District of Columbia Circuit, Nos. 88-5404 and 88-5402.

Reg. 38,278, amending 32 C.F.R. 2003.20. The regulations clarify all outstanding SF 189 agreements by substituting for the term "classifiable information" a more precise description of the categories of information to which that shorthand label was intended to refer: "unmarked classified information (including oral communications), and unclassified information that meets the standards for classification and is in the process of a classification determination" (32 C.F.R. 2003.20(h)(1)). The new ISOO regulations also state the basis on which an employee may be held liable for an unauthorized disclosure of information covered by SF 189 (or the new SF 312, discussed below)—namely, if he knew or reasonably should have known that the information was classified or in the process of a classification determination (32 C.F.R. 2003.20(h)(3)). On September 26 and 30, 1988, instructions were issued on behalf of the DCI to clarify the existing Form 4193 agreements by substituting similar language for the term "classifiable" and to require appropriate government officials to furnish notification of these changes to employees who had previously signed that Form. Pursuant to a further order entered in *NFFE* and *AFGE* on September 26, 1988, all federal agencies were required by October 27, 1988, to furnish individualized notice of the clarification to employees who had signed SF 189 and Form 4193 (J.A. 64-65).

In addition, effective September 29, 1988, the Director of ISOO replaced SF 189 on a prospective basis with a new SF 312 (J.A. 66-70; 32 C.F.R. 2003.20(a)). SF 312 likewise omits the term "classifiable" and refers instead only to "classified" information (including information that is unmarked) and information that meets the standards for classification and is in the process of a classification determination. Like Form 4355 (see page 10, *supra*), SF 312 provides that if the signatory is uncertain about the classification status of information, he must confirm with an authorized official that the information is unclassified before he may disclose it (J.A. 67). Any person who previously signed an SF 189 is permitted to sign an SF 312 in its place (32 C.F.R. 2003.20(b)).[13]

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[13] As noted above (see pages 9-10, *supra*), the DCI previously had replaced Form 4193 with Form 4355, which also omits the term "classifiable."

3. Because Section 630 was enacted as a rider to an appropriations law for fiscal year 1988, it expired on September 30, 1988. However, Section 619 of the Treasury, Postal Service and General Government Appropriations Act, 1989, Pub. L. No. 100-440, 102 Stat. 1721, contains restrictions on the expenditure of appropriated funds for fiscal year 1989 that are identical to those in Section 630 of the 1988 act.[14]

SUMMARY OF ARGUMENT

I. The President's constitutionally assigned roles as Commander in Chief, sole organ of the Nation in its external relations, and head of the Executive Branch grant him complete authority over matters of national defense and foreign affairs within the Executive Branch. The subordinate personnel who assist him in these responsibilities therefore must be subject to his direction. This constitutional imperative of Presidential control applies to the protection of national security information to which his subordinates have access. Congress has a role to play in the areas of national defense and foreign affairs, by virtue of the need for the Senate to consent to treaties and Congress's powers to declare war, provide an Army and Navy, regulate the land and naval forces, and appropriate funds. But Congress must exercise those powers in a manner that respects the principle of Presidential control over the execution of his own inherent powers and whatever laws Congress may enact. Accordingly, Congress may not vest final decision-making authority in lower-ranking Executive Branch personnel on matters of na-

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[14] When the President signed the 1989 Act, he expressed serious reservations about the constitutionality of Section 619. The President explained that "[o]ur Nation's security depends upon our success in diplomatic, military, and intelligence activities, and that success depends upon our ability to protect the Nation's secrets"; and he stressed that he has the "constitutional responsibility to ensure the secrecy of information whose disclosure would threaten our national security" (24 Weekly Comp. Pres. Docs. 1189 (Sept. 23, 1988)). The President therefore directed that, in accordance with his sworn obligation to preserve, protect, and defend the Constitution (see Art. II, § 1, Cl. 8), Section 619 would be considered to be of no force and effect unless and until this Court reverses the district court's ruling in the instant case holding the identical provisions in Section 630 of the 1988 Act unconstitutional (*ibid.*).

tional defense and foreign affairs, including the disclosure of national security information.

II. Section 630 of the Treasury, Postal Service and General Government Appropriations Act for Fiscal Year 1988 prohibits the use of funds to implement or enforce classified information nondisclosure agreements having five specified features. The principal concern of Congress, reflected in subsection (2), was satisfied when the arguably vague and overbroad reference to "classifiable" information was deleted from all forms in 1988.

Appellants contend that the forms violate subsection (1) of Section 630 because they apply to unmarked information if it is classified or in the process of a classification determination but do not expressly require that the employee know of that status in order to be subject to sanctions. Contrary to appellants' view, Congress may not constitutionally prohibit the President from taking action against an employee who disclosed information he should have known was classified and who failed even to check on its classified status before he did so. The President's constitutional responsibility to assure the fullest protection for national security information requires that he be able to limit access by (or take other action against) an employee whose negligent conduct undermines the trust that had been reposed in him. In any event, subsection (1) should not be construed as presenting this constitutional issue, because it does not bar the requirement in the new forms that an employee confirm the status of information if he is uncertain whether it is classified.

Subsections (3), (4) and (5) of Section 630 concern the furnishing of national security information by Executive Branch employees to Congress. The President's constitutional responsibilities require that he have direct control over access by anyone, including Members of Congress, to such information in the Executive Branch, and the President has uniformly limited access to classified information to persons who have a need to know the particular information, such as a congressional committee having specific jurisdiction over the subject matter. Congress cannot circumvent this limitation and undermine the President's control over national security information by vesting lower-level employees with a "right" to furnish any classified information to

any Member of Congress. As it happens, appellants concede that subsections (3), (4) and (5) do not confer such a right on Executive Branch employees and do not confer a right on Congress to receive classified information. Instead, appellants concede that those subsections simply prohibit nondisclosure forms from imposing a new burden (such as a requirement of prior authorization) on the exercise of whatever preexisting right (if any) employees might have to furnish classified information to Congress or whatever right Congress might have to receive it. Moreover, appellants expressly do not ask this Court to determine the scope of whatever right employees might have in this regard from some other source, such as the First Amendment or 5 U.S.C. 7211, which preserves the right to petition Congress. They do argue, however, that appellees should individually notify all signatories that the nondisclosure forms do not supersede prexisting rights. But Section 630 does not itself require any notice. And since appellants do not ask this Court to decide whether subsections (3), (4) and (5) have been violated, no notice should be ordered as a "remedy" for what would at most be a purely hypothetical statutory violation.

ARGUMENT

I. THE CONSTITUTION VESTS THE PRESIDENT WITH THE PRIMARY RESPONSIBILITY AND POWER TO PROTECT NATIONAL SECURITY INFORMATION WITHIN THE EXECUTIVE BRANCH

The nondisclosure agreements at issue in this case are personal pledges given by individuals who occupy positions in the Executive Branch that they will respect the trust and confidence that have been reposed in them. The President's authority to demand such a promise rests on the fundamental principle that the Constitution vests the President with personal responsibility over all matters within the Executive Branch that bear on national defense and foreign affairs, including the collection and dissemination of national security information. The Constitution does not permit Congress to thwart the President's discharge of that responsibility by insulating lower-level employees from accountability for their negligent failure to maintain the

confidentiality of national secrets or by vesting those employees with unsupervised discretion to disclose classified information to persons who have not been authorized by appropriate Executive Branch officials to receive it.

A. COMPLETE AUTHORITY OVER NATIONAL DEFENSE AND FOREIGN AFFAIRS WITHIN THE EXECUTIVE BRANCH IS VESTED DIRECTLY IN THE PRESIDENT, BY VIRTUE OF HIS STATUS AS COMMANDER IN CHIEF, SOLE ORGAN OF THE NATION IN ITS EXTERNAL RELATIONS, AND HEAD OF THE EXECUTIVE BRANCH

1. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee,* 453 U.S. 280, 307 (1981) (quoting *Aptheker* v. *Secretary of State,* 378 U.S. 500, 509 (1964)). In recognition of this compelling interest, the Constitution expressly assigns to the President a number of responsibilities that are critical to the protection of the Nation's security.

Most importantly, the Constitution provides that the President "shall be Commander in Chief of the Army and Navy of the United States" (Art. II, § 2). Moreover, the President has "the fundamental duty, under Art. II, § 1, of the Constitution, to 'preserve, protect and defend the Constitution of the United States.' Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means." *United States* v. *United States District Court,* 407 U.S. 297, 310 (1972). In the field of foreign relations, the Constitution provides that the President "shall appoint Ambassadors" with the advice and consent of the Senate (Art. II, § 2, Cl. 2), and "shall receive Ambassadors" from other Nations (Art. II, § 3). The President also has the power to "make Treaties" with the advice and consent of the Senate (Art. II, § 2, Cl. 2), and "he alone negotiates" with other nations (*United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 319 (1936)). These provisions underlie "the generally accepted view that foreign policy [is] the province and responsibility of the Executive" (*Haig* v. *Agee,* 453 U.S. at 293-294). See also *United*

States v. *Pink*, 315 U.S. 203, 228-230 (1942). In addition to these specific grants of power, the President is vested generally with "[t]he executive Power" (Art. II, § 1) and with the correlative duty to "take Care that the Laws be faithfully executed" (Art. II, § 3). "This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 (1982); see also *Myers* v. *United States*, 272 U.S. 52, 117, 151 (1926).

The Framers understood that their reasons for vesting the executive power in the President alone—to create a unitary, vigorous and independent Executive, see *The Federalist No. 68*, at 411-414 (C. Rossiter ed. 1961) (Hamilton); *id. No. 70*, at 423-424, 428-429 (Hamilton); 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 65-67, 71-74, 96-97, 109, 254, 266-267 (rev. ed. 1966)—were of greatest importance and most sharply focused in the areas of national defense and foreign affairs. As Alexander Hamilton explained regarding the President's role as the Commander in Chief: "[T]he power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority," and "[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand" (*The Federalist No. 74*, at 447). Similarly, "[a]s Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' " *Curtiss-Wright*, 299 U.S. at 319, quoting 10 Annals of Cong. 613 (1800); *Pink*, 315 U.S. at 222-223. See also *The Federalist No. 75*, at 451-452 (Hamilton).

Although all executive powers pertaining to the national security are vested directly in the President, he cannot, "alone and unaided," perform the myriad and complex tasks involved in their execution (*Myers*, 272 U.S. at 117; *Buckley* v. *Valeo*, 424 U.S. 1, 135-136 (1976)). Congress accordingly has established various departments and agencies to assist him in these

endeavors. However, the officers whom he appoints to head those departments and agencies are his "subordinates" (*ibid.*) and are "subject to his superintendence" (*The Federalist No. 72*, at 436 (Hamilton)), and lower-ranking officers and employees are subject to the President's supervision and control through those principal officers. As a result, in the case of officers and employees of the Department of State, Department of Defense, and the CIA, as well as others who are "appointed to aid the President in the performance of these [constitutional] duties," "their acts are his acts" (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803), quoted in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 631 (1935); see also *Myers*, 272 U.S. at 132-134)).

This constitutional imperative of Presidential control was recognized by the First Congress when it established the Department of Foreign Affairs and the Department of War,[15] and has been respected ever since. Section 1 of the Act of July 27, 1789, ch. 4, 1 Stat. 28, provided that the Secretary of Foreign Affairs "shall perform and execute such duties as shall from time to time be enjoined on or entrusted to him by the President of the United States" and "shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct." [16] Congress likewise directed the Secretary of War to follow the President's instructions in "matters respecting military or naval affairs" (Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49-50). Congress has retained to

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[15] See 1 Annals of Cong. 512 (1789) (remarks of Rep. Vining) ("The Departments of Foreign Affairs and War are peculiarly within the powers of the President, and he must be responsible for them"), quoted in *Myers*, 272 U.S. at 124-125.

[16] In *Marbury* v. *Madison*, Chief Justice Marshall referred to the Act establishing the Department of Foreign Affairs as an illustration of a case in which the acts of officers appointed by the President "[t]o aid him in the performance of these duties" are "his acts" (5 U.S. (1 Cranch) at 166). The office of the Secretary of Foreign Affairs of course was the subject of the "Decision of 1789," in which Congress recognized that the Constitution requires the Secretary to serve at the pleasure of the President. See *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986); *Humphrey's Executor*, 295 U.S. at 631; *Myers*, 272 U.S. at 111-126.

the present day the language of the 1789 Act that prescribes the duties of the Secretary of State (22 U.S.C. 2656), and it has provided that the Secretary of Defense "is the principal assistant to the President in all matters relating to the Department of Defense" and is "[s]ubject to the direction of the President" in administering its affairs (10 U.S.C. 133(b); see 50 U.S.C. 401). See also 50 U.S.C. 402 (NSC), 403 (CIA).

The principle of Presidential responsibility for the implementation of the defense and foreign relations of the United States is thus firmly embedded in our national experience and our constitutional and statutory framework. In the exercise of this responsibility, it is critical that the President be able to "place in each member of his official family, and his chief executive subordinates, implicit faith" (*Myers*, 272 U.S. at 134). That means, at least as to those chief executive officers engaged in sensitive foreign policy and national security functions, that the President must be able to dismiss them at will (*ibid.*).[17] It also means, we believe, that the President must be able to exact promises from those officers and their subordinates that they will discharge their functions in a manner consistent with the requirements of their offices and positions, and must be able to enforce such promises with appropriate sanctions. For Congress to deny the President this crucial prerogative of executive leadership, no less than to constrain his ability to discharge key executive subordinates, would "make impossible that unity and coordination in executive administration essential to effective action" (*ibid.*).

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[17] In *Humphrey's Executor*, the Court held that its conclusion in *Myers* regarding the President's illimitable power of removal did not apply to members of the Federal Trade Commission; but the Court did not disturb the reasoning of *Myers* as to "purely executive" officers, such as the Secretary of Foreign Affairs, at issue in the Decision of 1789. See 295 U.S. at 631. In *Morrison* v. *Olson*, No. 87-1279 (June 29, 1988), although the Court sustained the statutory provisions that permit the President to remove an Independent Counsel only for "cause," it stressed that "*Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." Slip op. 31. Surely, the Secretary of State, the Secretary of Defense, the DCI, and other officers who assist the President in the areas of national defense and foreign relations must fall in that category.

2. To be sure, Congress has a role in the areas of national defense and foreign affairs. As appellants point out (Br. 22-23), the advice and consent of the Senate are required for the making of treaties and appointment of ambassadors (Art. II, § 2, Cl. 2); Congress as a whole is granted the powers to "provide for the common Defence," "declare War," "raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval Forces" (Art. I, § 8, Cls. 1, 11-14); and the Executive is retrained by the constitutional limitation that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" (Art. I, § 9, Cl. 7). See also AFL-CIO Br. 12-20; House Br. 18-19, 26. But these powers are conferred on Congress in the same document that confers on the President the status of Commander in Chief and the several powers (concerning the appointment and receiving of ambassadors and the making of treaties) that manifest the President's status as the " 'sole organ of the nation in its external relations' " (*Curtiss-Wright*, 299 U.S. at 319). The Framers therefore plainly intended that Congress would exercise its enumerated powers in a manner that respects the President's unique status and distinct responsibilities under the Constitution.

In particular, Congress must respect the constitutional requirement that the President at all times retain control over the implementation of whatever substantive measures the Constitution authorizes Congress to enact in the area of national defense and foreign relations. Especially in matters touching upon the national security, that is the very essence of "[t]he executive Power" and of the duty to "take Care that the Laws be faithfully executed." Indeed, only by vesting the President with complete authority over the execution of whatever laws Congress may enact could the Framers assure that the shared responsibilities of Congress and the President would be harmonized and that the Nation would speak with one voice to the rest of the world.[18]

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[18] See *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 110 (1948) ("Legislative and Executive powers are pooled obviously to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies.").

The foregoing discussion makes clear, for example, that Congress could not, simply by invoking its power to make appropriations or to "make Rules for the Government and Regulation of the land and naval Forces," enact a rule that effectively deprived the President of his power as Commander in Chief by purporting to vest final and independent decision-making authority on a question of military judgment in a lower-ranking officer who was not subject to his command. Nor could Congress, simply by invoking its power to make appropriations or to establish and define the duties of offices in the Executive Branch (Art. II, § 2), vest an Executive Branch officer other than the President with final and independent authority to determine whether and how discourse should be conducted with another nation. Such legislative impediments to the full assumption of personal authority and responsibility by the President would disarrange the constitutional structure that the Framers deemed necessary to protect the security of the Nation and the freedom of its people (compare *Bowsher* v. *Synar*, 478 U.S. 714, 722, 730 (1986); *INS* v. *Chadha*, 462 U.S. 919, 959 (1983)); would " 'impermissibly threaten[ ] the institutional integrity of the [Executive] Branch' " (*Mistretta* v. *United States*, No. 87-7028 (Jan. 19, 1989), slip op. 22, quoting *CFTC* v. *Schor*, 478 U.S. 833, 851 (1986)); and would, by definition, " 'disrupt[ ] the proper balance between the coordinate branches' [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions" (*Morrison* v. *Olson*, No. 87-1279 (June 29, 1989), slip op. 36, quoting *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977)).[19]

[19] Appellants rely (Br. 27) on Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637-638 (1952), for the proposition that the President's power is at its "lowest ebb" when he takes action incompatible with the will of Congress. However, *Youngstown* involved an effort by the President to take control of private property, not, as here, the authority of the President to direct the actions of his subordinates within the Executive Branch who assist in the performance of his constitutional duties. Here, unlike in *Youngstown*, the President unquestionably has inherent powers stemming from his role as Commander in Chief and the Nation's representative in foreign affairs. It is the power of Congress, not that of the President, that is at its "lowest ebb" when an Act of Congress would frustrate the President's accomplishment of that role.

B. THE PRESIDENT'S CONSTITUTIONAL AUTHORITY OVER NATIONAL DEFENSE AND FOREIGN RELATIONS REQUIRES THAT HE HAVE CONTROL OVER NATIONAL SECURITY INFORMATION IN THE EXECUTIVE BRANCH

The constitutional imperative of Presidential control applies in full measure to the protection of national security information that Executive Branch employees create or handle in assisting the President in the performance of his duties as Commander in Chief and representative of the Nation in foreign affairs.

1. For reasons "too obvious to call for enlarged discussion" (*CIA* v. *Sims*, 471 U.S. 159, 170 (1985)), secrecy is often essential to the successful conduct of the Nation's defense and foreign relations. This Court has recognized that the success of most negotiations depends upon the assurance that information shared between the President's agents and the representatives of foreign nations will remain confidential. *Curtiss-Wright*, 299 U.S. at 319-321. In addition, the collection of reliable intelligence is critical to the performance of a wide variety of military, diplomatic and similar undertakings related to the national security, and the continued flow of intelligence ordinarily requires that the information itself, as well as the sources and methods used to gather it, be held in the strictest confidence. *CIA* v. *Sims*, 471 U.S. at 169-173. The need for secrecy is also self-evident with respect to information concerning our own military plans, weapons and vulnerabilities, as well as information concerning nuclear facilities. See Exec. Order No. 12,356, §§ 1.3(a)(1), (2) and (7); *New York Times Co.* v. *United States*, 403 U.S. 713, 726-727 (1971) (Brennan, J., concurring); *id.* at 728 (Stewart, J., concurring). For these reasons, the Court repeatedly has acknowledged that the government has a " 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business." *Egan*, slip op. 8 (quoting *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980)); see also *United States* v. *Robel*, 389 U.S. 258, 267 (1967); *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953); *Totten* v. *United States*, 92 U.S. 105, 106 (1875).

2. Because the substantive responsibility for national defense and foreign relations—including the execution of whatever laws Congress may enact in these areas—is vested directly in the President, he must have direct and unimpeded control over the national security information whose confidentiality he deems necessary to the successful performance of his duties. In fact, the need for secrecy was one of the principal reasons why the Framers vested the responsibility for protecting the national security in the single hand of the President, rather than in a numerous and diffuse legislature. See *The Federalist No. 64*, at 392-393 (Jay) (quoted at page 43, *infra*); *Curtiss-Wright*, 299 U.S. at 321, quoting 1 Richardson, *Messages and Papers of the Presidents* 194 (1896) (" '[t]he necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President' "). As the Court explained in *Curtiss-Wright*, 299 U.S. at 320:

> [H]e, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in times of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

See also *CIA* v. *Sims*, 471 U.S. at 172-173.[20]

The Executive Branch officers and employees who are appointed to assist the President are his agents and serve at his direction in their gathering, retention, and dissemination of information bearing on the national security. Because "their acts are his acts" (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) at 166), the President must have the ultimate authority to decide whether any national security information generated or obtained by Executive Branch personnel should remain secret and to decide which other persons (if any) have a need to know it. In

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[20] See also *Chicago & Southern Air Lines*, 333 U.S. at 111 ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world.").

recognition of these principles, the Court recently affirmed in *Egan* that "[the President's] authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant" (slip op. 8). See also *Cafeteria & Restaurant Workers Union, Local 473,* v. *McElroy,* 367 U.S. 886, 890 (1961). Because "[t]he authority to protect [national security] information falls on the President as head of the Executive Branch and as Commander in Chief" (*Egan,* slip op. 8), Congress and the courts must respect the measures he determines to be necessary within the Executive Branch to assure the requisite protection for such information.

We do not suggest that Congress has no role to play in regulating national security information. For example, the espionage laws, 18 U.S.C. 798 *et seq.*, and the Intelligence Indentities Protection Act, 50 U.S.C. 421, furnish important protection for such information through the threat of criminal penalties, and the Classified Information Procedures Act (CIPA), 18 U.S.C. App. at 594, establishes procedures for securing classified information in the course of a criminal prosecution. See Appellants' Br. 22, 37; House Br. 21 & n.31. Significantly, however, those statutes defer to the judgment of the Executive Branch regarding the standards to be applied in the classification of information. So, too, does the exemption for national security information under the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(1).[21]

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[21] Contrary to the assertion by appellants (Br. 26) and amici (House Br. 20), our submission in no way calls into question the statutes that provide for the regulation and mandatory disclosure of *non*-classified documents in the possession of the Executive Branch, such as FOIA, 5 U.S.C. 552, the Privacy Act, 5 U.S.C. 552a, or the Government in the Sunshine Act, 5 U.S.C. 552(b). Appellants rely (Br. 24) on *EPA* v. *Mink,* 410 U.S. 73, 83 (1973), where the Court said of the FOIA national security exemption that "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional

Just as the President's roles as Commander in Chief and representative of the Nation in its foreign relations bar Congress from erecting legislative impediments to his full assumption of personal authority for national security matters (see pages 19-23, *supra*), so too do those roles bar Congress from erecting such impediments to Presidential control over national security information. As Justice Stewart eloquently explained, this result is compelled by both constitutional doctrine and practical necessity:

> The responsibility [for protecting classified information] must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. * * * [I]t is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

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ordering." But *EPA* v. *Mink* does not assist appellants here, because this case involves precisely such limitations on congressional ordering. As we explain below, although Congress has not sought to limit the substantive information that the President may require to be kept secret in the interest of national security, Congress has enacted provisions that, as appellants view them, would impede the President's ability to ensure that such information in fact will be kept confidential and that access to it will be limited to those who have a need to know.

This factor distinguishes the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2107 note, which was at issue in *Nixon* v. *Administrator* and which appellants cite (Br. 26, 34). There, as this Court was careful to point out (433 U.S. at 443-446, 449-451), Congress placed control over the dissemination of documents in the hands of an Executive Branch official and assured an opportunity for assertion by the President of the privilege for confidential communications. Moreover, contrary to appellants' apparent assertion (Br. 26), *Nixon* v. *Administrator* did not involve the application of the Materials Act to national security information.

New York Times Co. v. *United States*, 403 U.S. at 728-730 (Stewart, J., concurring) (footnote omitted). See also *Egan*, slip op. 10; *Cole* v. *Young*, 351 U.S. 536, 546 (1956). Executive Order No. 12,356 and the implementing nondisclosure forms at issue in this case are precisely the sorts of measures to which Justice Stewart referred.

II. SECTION 630 IS UNCONSTITUTIONAL TO THE EXTENT IT IS INTERPRETED TO DEPRIVE THE PRESIDENT OF HIS ABILITY TO PREVENT NEGLIGENT DISCLOSURES OF NATIONAL SECURITY INFORMATION AND TO DEPRIVE THE PRESIDENT OF CONTROL OVER DISSEMINATION OF SUCH INFORMATION, INCLUDING TO MEMBERS OF CONGRESS

After a thorough study within the Executive Branch, the President concluded in 1982 that nondisclosure agreements such as those at issue here perform essential functions in protecting national security information that is classified pursuant to Executive Order 12356. Such agreements serve clearly to define the personal obligations of the officers and employees who will be granted access to national security information, and to assure that each employee fully appreciates the exacting nature of the trust relationship he is assuming with the United States Government and the consequences that may result from a breach of that trust. See *Snepp*, 444 U.S. at 510-511 & nn. 5 and 6, 515; *Webster* v. *Doe*, slip op. 7-8; Webster Decl. ¶ 8 (J.A. 43). For these reasons, NSDD 84 requires all employees who have access to SCI and other classified information to sign a nondisclosure form as a condition of access. Just as this Court held in *Snepp* that such agreements are an "entirely appropriate" way for the DCI to implement his statutory duty to protect intelligence sources and methods from unauthorized disclosure (444 U.S. at 509 n.3), they also are an entirely appropriate way for the President to implement his constitutional duty to protect classified information generally, by setting forth the standards to which Executive Branch employees would be held under Executive Order 12,356 even in the absence of a written agreement. Appellants do not contend otherwise.

Appellants do, however, object to particular features of the forms, arguing that they are (or may be) inconsistent with Sec-

tion 630 of the Treasury, Postal Service and General Government Appropriations Act for fiscal year 1988.[22] Appellants do not seriously dispute that the actions of the DCI and ISOO Director have satisfied Congress's principal concerns in enacting Section 630 (see Br. 19, 32-34)—elimination of the arguably vague and overbroad term "classifiable," which was the subject of subsection (2) of Section 630. But they remain dissatisfied with two other features of the nondisclosure agreements. First, appellants object that the new forms apply to unmarked information if it is classified or in the process of a classification determination, but do not expressly require that the employee *know* of that status in order to be subject to sanctions; appellants believe that this omission violates subsection (1) of Section 630. See Br. 19-20, 34-37. Second, although appellants take the position that subsections (3), (4) and (5) of Section 630 do not confer any *new* right to communicate classified information to Congress, they believe that all signatories of nondisclosure forms should be notified that subsections (3), (4) and (5) prohibit nondisclosure agreements from requiring prior authorization for the exercise of any *preexisting* right to furnish such information to Congress. See Br. 38-48. After briefly addressing the status of the dispute over the term "classifiable," we show that these two objections are unsound as a matter of both statutory construction and constitutional law.

A. THE PRINCIPAL CONCERN THAT LED TO THE ENACTMENT OF SECTION 630 HAS BEEN MET BY THE DELETION OF THE WORD "CLASSIFIABLE" FROM ALL OF THE CHALLENGED AGREEMENTS

All parties and amici agree that Congress enacted Section 630 in response to the use of the term "classifiable" in nondisclosure forms to describe the information that the signatory may not disclose. See pages 7-8, *supra*; Appellants' Br. 5-9; Senate Br. 3, 9-15; House Br. 2-3, 8-9; ACLU Br. 6-9; AFL-CIO/AFGE Br. 9. In 1987, some Executive Branch employees and Members of

[22] As noted above (see page 15, *supra*), the substance of Section 630 was reenacted in Section 619 of the 1989 Act. For convenience, we shall refer only to Section 630.

Congress began to express reservations regarding the use of the term "classifiable" in SF 189 (and Form 4193), because they believed that the term was vague and overbroad and therefore might impermissibly chill the exercise of First Amendment rights, and that the term might allow an agency to classify information after it had been disclosed in order to punish the employee who had disclosed it. It was these concerns that led to the filing of the *NFEE* and *ADGE* suits in August and September 1987, and to the last-minute insertion of Section 630 into the Continuing Appropriations Act for 1988 in December 1987. H.R. Conf. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987); see generally *Classified Information Nondisclosure Agreements: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 1-3, 5, 8-17, 22, 42-44, 53-56, 59, 63-64, 76-79, 84, 94-98, 103-110, 112, 116, 122, 133, 148, 151-154 (1987) [*1987 Hearing*].

Because the term "classifiable" was simply a shorthand label for a general concept—information that is not marked as classified but is classified, or information that is not classified but is in the process of a classification determination—the Executive Branch was willing to accommodate the concerns of those who objected to the use of this particular term. These efforts, unfortunately, did not reach fruition before Congress enacted Section 630.[23] After Section 630 was enacted, however, the DCI and Director of ISOO replaced Form 4193 and SF 189 on a prospective basis with Form 4355 and SF 312, which do not contain the word "classifiable." Furthermore, in September 1988, the DCI and Director of ISOO issued general directives that deleted the word "classifiable" from all outstanding Form

[23] As noted above (see note 6, *supra*), the Director of ISOO sought to clarify the meaning of the term "classifiable" in notices published in the *Federal Register* on August 3 and 11, 1987 (see 52 Fed. Reg. 28,802, 29,793 (1987)). Senator Grassley, a leading congressional critic of the term "classifiable" in then-existing forms, had sought to resolve the controversy by proposing a definition identical to that subsequently published by the Director of ISOO on December 21, 1987 (*1987 Hearing* at 10-12, 101; 52 Fed. Reg. 48,367 (1987)), and subsection (1) of Section 630 (which was enacted on December 22, 1987) manifests agreement with that definition (see pages 30-32, *infra*). See also Aff. of Sen. Grassley ¶¶ 5-7 (Nov. 18, 1987) (J.A. 38-39).

4193 and SF 189 agreements and substituted in its place a more precise description of the concept to which that term was intended to apply: (i) information that is marked classified, (ii) information that is unmarked but classified (including oral communications), and (iii) information that meets the standards for classification under a pertinent Executive Order and is in the process of a classification determination. See pages 13-14, *supra*.

The deletion of the term "classifiable" removes any basis for a claim by appellants that outstanding Form 4193 and SF 189 agreements violate subsection (2) of Section 630, and the substitute language ensures that those agreements (like the new Form 4355 and SF 312) are narrowly drawn and will be fully understood by the signatories to apply only to those categories of information that are at the core of the President's constitutional duty to protect the national security. In addition, the three categories of information specified in the revised agreements are the same as those listed in subsection (1) of Section 630. The steps taken by the DCI and Director of ISOO therefore have the effect of bringing the substantive scope of the nondisclosure forms into harmony with Section 630.[24] The

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[24] Appellants complain (Br. 15, 20) that *former* employees who previously signed Form 4193 or SF 189 have not been individually notified of the substitution of more precise language for the term "classifiable." Individualized notice of the substitution was furnished to *current* employees pursuant to the district court's September 26, 1988, order in the companion *NFFE* and *AFGE* cases (J.A. 65), which was based on the First Amendment, not Section 630. The district court in those cases did not extend individualized notification relief to former employees, and the DCI and Director of ISOO did not order federal agencies to furnish such notice because of the administrative burden of tracking down persons who have left those agencies. The same considerations would weigh heavily against ordering individualized notice to former employees under Section 630 in this case.

In any event, subsection (2) of Section 630, upon which appellants rely, says nothing about furnishing individualized notice to anyone, whether a present or former employee. See ACLU Br. 26 n.17. It simply bars the use of appropriated funds to "implement or enforce" a form or agreement that "contains the term 'classifiable.'" By virtue of the deletion of the term "classifiable," no outstanding Form 4193 and SF 189 agreement "contains" that term, and it is clear that appropriated funds are not being used to implement or enforce it. See Senate Br. 14. Individualized notice to former employees would be inappropriate in this case for the additional reasons that:

Senate, House of Representatives and ACLU, appearing as amici curiae, agree that Congress's principal concerns in enacting Section 630 have been satisfied by the deletion of the term "classifiable" from all nondisclosure agreements. Senate Br. 8, 14; House Br. 2-3, 4, 11, 14; ACLU Br. 20, 23-28. See also 135 Cong. Rec. S1161-S1162 (daily ed. Feb. 2, 1989) (statement of Senator Mitchell supporting resolution authorizing filing of Senate's brief in this case).

Appellants' two remaining objections concern subsection (1) of Section 630—because existing nondisclosure agreements do not require actual (subjective) knowledge—and subsections (3), (4) and (5)—because signatories of the nondisclosure agreements have not been individually notified that such agreements do not interfere with any preexisting rights they may have to communicate with Members of Congress about matters involving classified information. The Senate, House of Representatives and ACLU urge the Court not to address these issues, because, in their view, those questions are not ripe for judicial resolution in this case. Senate Br. 15-23; House Br. 12-16; ACLU Br. 28-48. We agree with the amici that the remaining aspects of this case do have a highly abstract and speculative quality. This is in part attributable to the failure by appellants to identify any concrete instance in which an employee disclosed unmarked information that he should have known was classified, or in which an employee disclosed national security information to a Member of Congress without prior authorization.[25]

(i) no individual former (or present) employee was a plaintiff in this case; (ii) the complaint in this case identified appellant AFSA (the only non-congressional plaintiff) as a "professional and labor association of foreign service employees" (J.A. 6) and made no mention of former employees; and (iii) the complaint sought an order directing the DCI and Director of ISOO to notify "all employees" who signed SF 189 or Form 4193 at any time that any provisions inconsistent with Section 630 could not be enforced during fiscal year 1988 (J.A. 10), but it once again made no mention of former employees. Finally, although the complaint sought to require the DCI and Director of ISOO to take certain steps on a government-wide basis, AFSA only has standing to seek relief on behalf of its members (*International Union, United Automobile Workers of America* v. *Brock*, 477 U.S. 274, 281-282 (1986)), who presumably work almost exclusively for the State Department.

[25] In fact, we argued in our motion to affirm (at 21, 27-28) that if the Court does not reject appellants' contentions outright under subsections (1), (3), (4)

In our view, however, the abstract and speculative nature of the remaining aspects of this case is attributable not only to appellants' failure to prove their case, but also to the fact that subsections (1), (3), (4) and (5) of Section 630 did not receive the same focused attention that at least some Members of Congress gave to the use of the term "classifiable" in the nondisclosure forms. Perhaps this accounts for the language in those subsections that, if read expansively, could substantially interfere with the President's constitutional authority to limit dissemination of and access to national security information, without any attempt to take account of competing concerns of the Executive Branch. In fact, the subsections dealing with the furnishing of classified information to Congress appear essentially to be unilateral and sweeping assertions of prerogatives by one political Branch at the expense of the other, rather than a studied legislative response to the sensitive problems involved in the sharing of confidential information between the Branches (such as that embodied in the Classified Information Procedures Act (CIPA), 18 U.S.C. App. at 595).

Like the amici, we do not believe that subsections (1), (3), (4) and (5) of Section 630 should be read to invalidate any provisions of the existing nondisclosure agreements, especially in light of the serious constitutional questions that would be presented by a contrary construction. But we nevertheless have

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and (5), as a matter of either statutory construction or constitutional law, it nevertheless should deny appellants relief because those claims are not ripe or because appellants have failed to establish a basis for equitable relief. This Court has traditionally been reluctant "to decide important questions regarding 'the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case.' " *Kleppe* v. *New Mexico*, 426 U.S. 529, 546 (1976) (quoting *International Longshoremen's Union, Local 37* v. *Boyd*, 347 U.S. 222, 224 (1954)); see also *Public Affairs Assocs., Inc.* v. *Rickover*, 369 U.S. 111, 112-113 (1962). That principle has special force here, because even in the context of a concrete case, the courts have been reluctant to second-guess the factors upon which the responsible Executive Branch official may rely in limiting access to and dissemination of classified information. *Egan*, slip op. 9-11; *Webster* v. *Doe*, slip op. 7-8. Judicial hesitation might also be appropriate because Section 630 purports to be only a temporary legislative restriction on the manner in which federal agencies may spend appropriated funds, not permanent legislation that confers rights directly on private parties. Compare *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-693 (1979).

substantial concerns about Congress's view—which seems to have animated the enactment of 630—of the scope of its power to intrude upon the President's ability to control national security information within the Executive Branch. We also are concerned that the mere existence of a statute that could be read to insulate employees who make negligent or unauthorized disclosures from any sanctions may undermine the "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp*, 444 U.S. at 509 n.3.

B. SECTION 630 CANNOT CONSTITUTIONALLY BE APPLIED TO DEPRIVE THE PRESIDENT OF HIS AUTHORITY TO PREVENT THE NEGLIGENT RELEASE OF NATIONAL SECURITY INFORMATION BY HIS SUBORDINATES

Subsection (1) of Section 630 provides that appropriated funds may not be used to implement or enforce a nondisclosure policy, form, or agreement that "concerns information other than that specifically marked classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination." Appellants contend (Br. 19-20, 36-37) that appellees are not in compliance with subsection (1) of Section 630 because the nondisclosure forms at issue in this case do not expressly require as a condition of liability that the employee *know* of that protected status.[26] In appellants' view, Congress may constitutionally prohibit the President and other Executive Branch officials from taking *any* action—even limiting further access to national security information—against an employee

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[26] As appellants point out (Br. 35), the nondisclosure agreements must go beyond information that is actually marked classified in order to protect oral communications of national security information, unmarked notes from classified meetings, and as-yet unmarked information that is in the process of a classification determination. See *1987 Hearing* at 63, 78, 99. Appellants are wrong in contending (Br. 35-36), however, that this information is not pro-

who disclosed information that he *should have known* was classified or who negligently failed even to check on its classified status before doing so. We disagree with appellants on both constitutional and statutory grounds.

1. Appellants are clearly wrong in contending that Congress may constitutionally bar the President from providing for the taking of disciplinary action against an Executive Branch employee—or even from denying him further access to classified information—if the employee makes an unauthorized disclosure of national security information that is "only" reckless or negligent, rather than intentional. The former type of disclosure can cause as much harm to the national security as the latter: intelligence sources may dry up, a foreign government whose confidences were betrayed may be offended, or a hostile power may use the information to its advantage. Neither type of security breach can be tolerated, and the Constitution vests the President with the necessary tools to prevent and deter both.

As we have explained above (see pages 24-28, *supra*), the Constitution itself confers on the President the authority to classify and control access to information bearing on the national defense and foreign relations of the United States and to determine whether a person is sufficiently trustworthy to occupy a position in which he will have access to such information. " 'As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities' " (*Egan*, slip op. 11, quoting *United States* v. *Nixon*, 418 U.S. 683, 710 (1974)). Accordingly, neither the courts nor Congress

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tected by Executive Order 12,356 itself simply because it is not marked. The section of the Executive Order that provides for classification of information does not condition that status on the fixing of a marking (see § 1.3(b)), and in fact that section does not refer to markings at all. That subject is addressed by Section 1.5(a), which lists certain information that must be shown on the face of all classified documents or be "clearly associated with other forms of classified information in a manner appropriate to the medium involved." As appellants acknowledge (Br. 35), no marking would be "appropriate" or even feasible in the case of oral communications, but this does not render the substance of those communications ineligible for classified status under Section 1.3 of the Executive Order.

may lightly disable the President from taking measures that he concludes are necessary to protect such information within the Executive Branch, including measures designed to prevent negligent as well as knowing disclosures.

The Constitution imposes on the President the duty to "take Care that the Laws be faithfully executed" (Art. II, § 3). That duty requires the President to exercise the utmost caution and discretion in guarding the Nation's secrets, and to select as his immediate assistants persons in whom he has complete confidence to do the same. Those agency heads in turn must select subordinate officers and employees in whom they have sufficient confidence to warrant entrusting them with classified information. As this Court recently explained, "the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." *Egan,* slip op. 10. In fact, *Egan* reiterated the observation in *Cole* v. *Young* that " 'there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the *final say* in deciding whether to repose his trust in an employee who has access to such information' " (slip op. 10 (emphasis added) (quoting 351 U.S. at 546)). See also *Webster* v. *Doe,* slip op. 7 ("the Agency's efficacy, and the Nation's security, depend in large measure on the reliability and trustworthiness of the Agency's employees").

If an employee's negligent disclosure of protected national security information causes the responsible official to lose confidence in the assurance that the employee will not compromise such information in the future, that official must, at a minimum, have the authority to deny the employee further access to classified information. This conclusion follows from the settled Executive Branch practice, approved by this Court, in granting security clearances. It is firmly established that an employee has no "right" to a security clearance. Rather, "[t]he grant of a clearance requires an affirmative act of discretion on the part of the granting official," and "[t]he general standard is that a clearance may be granted only when 'clearly consistent

with the interests of the national security' " (*Egan*, slip op. 9 (quoting Exec. Order No. 10,450, §§ 2 and 7, 3 C.F.R. 936-937, 938 (1949-1953 Comp.)).[27] The responsible official unquestionably could decide that it would not be "clearly consistent" with the national security to grant continued access to an employee who made an unauthorized disclosure of information that he should have known was classified or in the process of a classification determination. See also *Cole* v. *Young*, 351 U.S. at 550 (a "security risk" is present if a person might make an "intentional or inadvertent disclosure of confidential information").[28]

A negligent disclosure of classified information may properly give rise to disciplinary action as well. Even where the right of a superior to remove an officer or employee of the Executive Branch is subject to limitation by Congress, the President's duty to "take Care" requires at a minimum that he be able to remove (or to direct the removal of) a subordinate official for "cause." See *Morrison* v. *Olson*, No. 87-1279 (June 29, 1988), slip op. 33-34. The unauthorized disclosure of national security information that an employee should have known was classified or in

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[27] Congress has employed comparable formulations. See 50 U.S.C. 831, 832(b) (NSA) ("clearly consistent with the national security"), at issue in *Carlucci* v. *Doe*, No. 87-751 (Dec. 6, 1989); 5 U.S.C. 7532 (employee may be removed if "necessary or advisable in the interests of national security"), at issue in *Carlucci* v. *Doe* and *Cole* v. *Young*); 50 U.S.C. 403(c) (DCI may terminate CIA employee if he deems it "necessary or advisable in the interests of the United States"), at issue in *Webster* v. *Doe*.

[28] Appellants point out (Br. 37) that an individual may be held criminally liable for disclosure of the identity of a covert agent only if he knows that the information identifies the agent and the United States is taking steps to conceal the covert relationship. 50 U.S.C. 421(a) and (b). See also 18 U.S.C. 798 (criminal penalties for knowing and willful use or communication of classified material). However, in these statutes, Congress has sought to reinforce, not undermine, the protection for national security information that is afforded by the Executive Branch pursuant to its inherent authority, and a scienter requirement is in any event common in the criminal law. The availability of these criminal penalties in no way displaces or obviates the need for the Executive Branch to retain the inherent authority to deny further access to classified information to employees who make unauthorized disclosures of information that may not be intentional but nevertheless constitute serious breaches of security.

the process of a classification determination would in many circumstances be cause for removal, and would unquestionably be cause for at least some disciplinary action in virtually all cases.

As the Court recognized in *Snepp*, when an individual is granted access to the Nation's most sensitive secrets, he enters into a special fiduciary relationship with the government that entails a high degree of trust. 444 U.S. at 510-511 & n.5; see also *Webster* v. *Doe*, slip op. 7-8; *United States* v. *Marchetti*, 466 F.2d 1309, 1313 (4th Cir.), cert. denied, 409 U.S. 1063 (1972). It is self-evident that such an employee may properly be held to an exacting degree of care in handling the secrets with which he is entrusted. Moreover, before an individual is granted access to classified information, he is briefed on the provisions of the current Executive Order on classification, pertinent regulations concerning handling, storage and protection of classified information, and his responsibilities and liabilities with respect to that information.[29] It therefore is manifestly fair, as well as important to the national security, that a person be held accountable for the unauthorized disclosure of information that he reasonably should know is classified or in the process of a classification determination.[30] If the employee has any doubt about whether particular information may be disclosed, he must err on the side of nondisclosure and inquire about the classified status of the information. Compare *Snepp*, 444 U.S. at 512.

Nor have appellants offered any compelling justification for an Act of Congress that would override the President's constitutional authority to impose this duty of care on Executive Branch employees who have access to national security information.

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[29] In fact, when employees signed the agreements that appellants challenge in this case, they expressly acknowledged that they received this indoctrination, that they were advised that the unauthorized disclosure or negligent handling of classified information could cause irreparable injury to the United States and could be used to the advantage of a foreign nation, and that breach of the agreement could lead to loss of a security clearance or employment (J.A. 15-16, 19, 21, 54-55, 56, 66-67).

[30] The district court observed in the *NFFE* and *AFGE* cases that "[t]he reasonable person standard is one to which people are held in all their activities, and it does not become unconstitutionally vague simply because First Amendment rights are involved" (Mot. to Aff. App. 19a).

Surely it is not justified by the First Amendment. This Court and other courts have already sustained various limitations on expression in the context of the fiduciary relationship involving access to classified information (*Snepp*, 444 U.S. at 509 n.3; *United States* v. *Marchetti*, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); *McGehee* v. *Casey*, 718 F.2d 1137 (D.C. Cir. 1983)), as well as military command (*Brown* v. *Glines*, 444 U.S. 348, 354 (1980); *Parker* v. *Levy*, 417 U.S. 733, 759 (1974)). "Even when not confronted with the special requirements of the military, [the Court] ha[s] held that a governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government." *Brown* v. *Glines*, 444 U.S. at 356 n.13; see *Rankin* v. *McPherson*, No. 85-2068 (June 24, 1987), slip op. 5, 10; *Connick* v. *Myers*, 461 U.S. 138, 140 (1983); *CSC* v. *Letter Carriers*, 413 U.S. 548, 565 (1973).

2. For the foregoing reasons, Congress may not constitutionally prohibit the President from denying further access to classified information to (or taking other appropriate action against) an employee who negligently disclosed information that he should have known was classified and who failed to inquire about its classified status before he did so. However, we do not believe that Congress took that extreme step when it enacted subsection (1) of Section 630.[31] To the contrary, like the Senate (Senate Br. 16-18), we believe that the nondisclosure forms adopted by the DCI and Director of ISOO are fully consistent with subsection (1).

Form 4355 states that an employee may not disclose information that he knows to be classified or in the process of a classification determination, and it imposes on the employee a duty to consult with appropriate management authorities in order to ensure that he knows whether information he has reason to believe is SCI is in fact regarded by the agency to be

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[31] Amicus AFGE, which was a plaintiff in one of the companion cases below, expresses a similar view, stating that "it is far from clear that § 630 is intended to preclude the Executive from taking disciplinary action against an employee who unknowingly but carelessly discloses unmarked information in the process of a classification determination" (AFL-CIO/AFGE Br. 25-26).

SCI (J.A. 55). SF 312 provides that the signatory will not disclose classified information (including that which is unmarked or in the process of a classification determination) without proper authorization, and it imposes a duty on the signatory, if he is uncertain about the classification status of the information, to confirm that the information is unclassified before disclosing it (J.A. 66-67).

The Senate takes the position that the duty to inquire imposed by Form 4355 and SF 312 does not conflict with subsection (1) of Section 630. The Senate argues (Br. 17-18) that "[n]either the purpose of section 630 nor the text of subsection (1) suggests that Congress intended to deny to the executive the power to require employees to take reasonable steps to learn whether information is classified or is undergoing a classification review, as long as they are not required to speculate about the actions of government classifiers." We agree. If the employee abides by this distinct duty to inquire, he will know prior to any occasion for disclosure whether a particular item of unmarked information is either classified or in the process of a classification determination, and subsection (1) therefore will not be implicated. Moreover, the employee's inquiry presumably will produce a clear answer about the current status of the information, which was the concern that led Congress to enact the related prohibition against use of the term "classifiable." See pages 29-30, *supra*. Appellants do not in any event challenge the duty-to-inquire feature of Form 4355 and SF 312, and subsection (1) should be construed to authorize that feature in order to avoid the serious constitutional question that would be presented if the President were barred from insisting that employees who have access to national security information take at least that precaution.

Appellants do object in passing (See Br. 15, 20) to the statement in the regulations published by the Director of ISOO on September 29, 1988, that a person who has signed an SF 189 or 312 "may be liable for disclosing 'classified information' only if he or she knows or reasonably should know" that unmarked information is classified or meets the standards for classification and is in the process of a classification determination. 32 C.F.R. 2003.20(h)(3), as added, 53 Fed. Reg. 38,279 (Sept. 29, 1988).

However, appellants' complaint in district court challenged only the nondisclosure *forms* (J.A. 8-10), and the validity of the cited ISOO regulation therefore is not properly before the court. See ACLU Br. 34-35 & n.26.[32] Moreover, questions concerning the meaning and validity of ISOO's standard-of-care regulation should await a concrete factual context in which the regulation is actually applied. See note 25, *supra*.[33]

C. SECTION 630 CANNOT CONSTITUTIONALLY BE APPLIED TO DIVEST THE PRESIDENT OF ALL CONTROL OVER THE DECISION WHETHER TO DISCLOSE NATIONAL SECURITY INFORMATION TO CONGRESS

As relevant here, the remaining provisions of Section 630 concern the furnishing of national security information by Executive Branch personnel to Congress. Subsection (3) provides that appropriated funds may not be used to implement a nondisclosure agreement that "directly or indirectly obstructs, by requirement of prior written authorization * * * or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;" subsection (4) bars any agreement that "interferes with the right of Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of Congress;" and subsection (5) prohibits any agreement that "imposes any obligations or invokes any remedies inconsistent with statutory law."

The language of these provisions bespeaks an inclination on the part of Congress to seek broad access to national security information in the Executive Branch by removing decisionmaking about congressional access from the usual channels in

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[32] Neither of the ISOO forms at issue here, SF 189 and SF 312, addresses the question of the standard of care; that is left to the cited ISOO regulation. Form 4193, which was superseded by the DCI in March 1988, likewise did not address the standard-of-care question.

[33] As the Senate points out (Br. 17), in the case of an employee who signed SF 312, the "reasonably should know" standard in the ISOO regulation would presumably be applied in tandem with the duty to inquire under SF 312, thereby perhaps ameliorating any problems that might be raised under subsection (1) of Section 630 by the regulation standing alone.

the Executive Branch and allowing lower-ranking employees to decide for themselves whether to divulge such information to Congress or its Members. If Section 630 actually enacted such a reordering into law, it clearly would be unconstitutional. As it happens, all parties agree that subsections (3), (4) and (5) do not confer such a right on Executive Branch personnel. See pages 48-50, *infra*. Nevertheless, the implications of such a statute furnish a useful backdrop for consideration of the remaining objection advanced by appellants.

1. We have explained above that the President's roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch. There is no exception to this principle for those disseminations that would be made to Congress or its Members. In that context, as in all others, the decision whether to grant access to the information must be made by someone who is acting in an official capacity on behalf of the President and who is ultimately responsible, perhaps through intermediaries, *to* the President. The Constitution does not permit Congress to circumvent these orderly procedures and chain of command—and to erect an obstacle to the President's exercise of all executive powers relating to the Nation's security—by vesting lower-level employees in the Executive Branch with a supposed "right" to disclose national security information to Members of Congress (or anyone else) without the authorization of Executive Branch personnel who derive their authority from the President. Such a law would squarely conflict with the Framers' considered judgment, embodied in the Commander-in-Chief and related Clauses of Article II, that all power in matters of national defense and foreign affairs in the Executive Branch must be vested in a *single* hand.[34]

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[34] By giving Congress free access to information at the core of the Executive's functions, such a law also would constitute precisely the sort of congressional "encroachment and aggrandizement that has animated [the Court's] separation-of-powers jurisprudence and aroused [the Court's] vigilance against the 'hydraulic pressure inherent within each of the separate Branches

Presidents have on numerous occasions exercised their authority over national security information as against requests by Congress for access to it. In fact, it has been recognized since the adoption of the Constitution that intelligence and other secret information obtained by the Executive Branch in the performance of its responsibilities in the areas of defense and foreign relations may properly be withheld from Congress, in order to provide the firmest assurance of confidentiality. As John Jay explained in *The Federalist No. 64*, at 392-393:

> It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases where, the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.

See also *id. No. 75*, as 452 (Hamilton). Consistent with this view, President Washington, less than ten years later, refused to accede to the request by the House of Representatives for the instructions, correspondence, and documents relating to the negotiation of the Jay Treaty—"a refusal the wisdom of which was recognized by the House itself and has never since been

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to exceed the outer limits of its power.' " *Mistretta*, slip op. 20-21 (quoting *INS* v. *Chadha*, 462 U.S. 919, 951 (1983)). Especially in these circumstances, appellants err in suggesting (Br. 20-21) that the Court should apply a balancing test derived from *Nixon* v. *Administrator*, 433 U.S. at 441, 443, in assessing the constitutionality of the statute.

doubted." *Curtiss-Wright*, 299 U.S. at 320. See 1 Richardson, *Messages and Papers of the President* 194 (1896).[35]

Later, when Jefferson was President, he declined to furnish certain material about the Burr conspiracy in response to a House resolution that itself contemplated that the President could withhold such information "as he may deem the public welfare to require not to be disclosed" (16 Annals of Cong. 336 (1807)). From that time to the present day, information has been withheld on numerous occasions by most of our Presidents, on the ground that disclosure would not be consistent with the public interest.[36] Relying on many of these precedents, Attorney General (later Justice) Jackson, with the approval and at the direction of the President, declined to comply with a request by the House Committee on Naval Affairs for FBI records concerning labor disputes and subversive activities at industrial establishments having naval contracts. 40 Op. Att'y Gen. 45 (1941). He explained that "the results of counterespionage activities and intelligence activities of [the

[35] The groundwork for this refusal had actually been established four years earlier, when President Washington received a request for documents by the House committee investigating the St. Clair expedition. President Washington had assembled the Cabinet on that occasion because he was concerned "that so far as it should become a precedent, it should be rightly conducted." 1 *The Writings of Thomas Jefferson* 303 (A. Lipscomb ed. 1903). Jefferson reported that Washington "could readily conceive there might be papers of so secret a nature, as that they ought not to be given up" (*ibid.*), and the Cabinet subsequently endorsed the view that the President "ought to refuse those [papers], the disclosure of which would injure the public" (*id.* at 304), although the President elected to furnish the particular documents at issue (*id.* at 305). This and other withholdings of information from Congress by the President are compiled in Office of Legal Counsel, "Memorandum for the Attorney General Re: History of Presidential Invocations of Executive Privilege Vis A Vis the Congress" (Dec. 14, 1982), *reprinted in* H.R. Rep. No. 968, 98th Cong., 2d Sess. 90-117 (1982) [hereinafter *OLC Memorandum*].

[36] The *OLC Memorandum* cited in note 35, *supra*, discusses withholdings of documents by Presidents Jackson (H.R. Rep. No. 968, *supra*, at 95-97), Tyler (*id.* at 97-100), Polk (*id.* at 100-103), Buchanan (*id.* at 103), Lincoln (*id.* at 103-104), Andrew Johnson (*id.* at 104), Grant (*id.* at 104-105), Cleveland (*id.* at 105-106), Harrison (*id.* at 105), McKinley (*id.* at 106), Theodore Roosevelt (*id.* at 106), and their successors (*id.* at 107-117).

Justice] Department involving those elements are kept within the fewest possible hands" and "cannot be too closely guarded," because the information would be "of inestimable service to foreign agencies" (*id.* at 46).

History thus confirms that the Executive Branch may properly decline to grant Members of Congress access to national security information and that the decision whether to do so must be made by the President or by another Executive Branch official who is accountable to him.[37] This arrangement parallels the decision regarding the assertion of the state secrets privilege in court, which must be "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States* v. *Reynolds*, 345 U.S. 1, 8 (1953) (footnote omitted); compare *United States* v. *Nixon*, 418 U.S. 68[illegible] *ed States* v. *AT & T*, 567 F.2d 121, 1[illegible] ;ress cannot undermine this consti[illegible] ...g., conferring a right on an Executive Branch employee to furnish a Member of Congress with information on treaty negotiations that the President has decided should be withheld.

This is not to say, of course, that there should be an inflexible rule calling for the routine withholding of all classified information from all Members of Congress. To the contrary, the sharing of confidential information in appropriate circumstances has been—and will continue to be—a proper subject of accommodation between the political Branches. But in light of the extreme sensitivity of the information concerned, both the Executive Branch and Congress have recognized that such communications must be conducted through the secure channels established by the Branches working in cooperation. One concrete example of this approach is the extensive cooperation between the relevant congressional committees, including the Select Committees on Intelligence in both Houses, and the Executive Branch agencies for which those committees have over-

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[37] Compare Art. II, § 3 (the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient").

sight responsibility. We have been informed by the CIA that it provided 66 classified briefings to Members of Congress and 711 classified briefings for congressional staff in 1988, and 111 classified briefings for Members and 738 classified briefings for staff in 1987. Similarly, the National Security Agency made more than 175 classified briefings and submissions to committee members and staff in 1988. These briefings, which were conducted through the official channels maintained by the congressional affairs office of each agency, were in addition to formal testimony and various required reports, such as those submitted pursuant to 50 U.S.C. 413.

This approach of furnishing information through established agency channels to the relevant committees is faithful to one of the fundamental principles of the President's program for assuring the fullest possible protection for national security information—namely, that a person may be granted access to a particular item of classified information only if he has a "need to know" that information for furtherance of official functions. The need-to-know principle is set forth in Executive Order 12,356 itself—the instrument through which the President maintains his authority over classified information within the Executive Branch—which provides that access may be granted only where it "is essential to the accomplishment of lawful and authorized Government purposes" (§ 4.1(a)). This restriction serves to keep the information in the fewest possible hands, consistent with the performance of official business, and thereby maximizes the opportunity for control, accountability, and protection against compromise. The need-to-know restriction applies throughout the Executive Branch, even to Cabinet Secretaries. There is no reason why it should not apply to Members of Congress as well. This important limitation is preserved when national security information is furnished through official agency channels to a relatively few Members of Congress who serve on a committee that has been designated by that House to be responsible for a particular jurisdiction in the area of defense, foreign affairs or intelligence. Congress in fact acted on this view when it provided by statute for the furnishing of reports and information on intelligence matters through official channels to the Intelligence Committee of each House. 50 U.S.C. 413. By contrast, if all lower-ranking Executive Branch personnel were free to furnish national security

information directly to any of 535 individual Members of Congress, the principle of limited and focused access based on a demonstrated need to know would be obliterated—and with it the safeguards of control and accountability. No system of information security could be effective if each individual having access to classified information could determine for himself what information may be disclosed, to whom, and when.[38] Cf. *Snepp*, 444 U.S. at 512 ("When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful.").[39]

The difficulties with such a regime would be exacerbated by the distinct institutional nature of a legislative body, which is comprised of numerous and largely autonomous members who (unlike Executive Branch personnel) are not personally accountable to any single officer. These institutional considerations may create additional problems in maintaining confidentiality within the Legislative Branch.[40]

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[38] For this reason, the House (Br. 14) and Senate (Br. 19) are wrong to the extent they suggest that because Members of Congress may have been granted access to particular classified information on particular occasions, the language in the nondisclosure agreements that permits disclosures to persons who are "authorized" to receive it (J.A. 15, 19-20, 55, 67) would permit Executive Branch employees to disclose *any* classified information to *any* Member of Congress at *any* time. The Director of ISOO has explained that although the status of Members of Congress as elected representatives is deemed to establish their general trustworthiness to have access to classified information, particular disclosures to Members of Congress are limited by the uniformly applicable need-to-know principle. See ISOO, *Classified Information Nondisclosure Agreement (Standard Form 312): Briefing Booklet* 50 (1988). The term "authorized" in the nondisclosure forms embodies this critical limitation.

[39] Ironically, the House Permanent Select Committee on Intelligence has recognized the importance of the need-to-know principle and has recommended that adherence to that principle be strengthened. See H.R. Rep. No. 5, 100th Cong., 1st Sess. 11 (1987).

[40] See S. Rep. No. 522, 99th Cong., 2d Sess. 90-95 (1986) (discussing targeting of congressional staff by hostile intelligence services and recommending centralized security procedures within the Senate). A recent report of the House Intelligence Committee stated that "[o]ther than the intelligence committees of the House and the Senate, the Congress has no personnel, physical, document and communications security programs which meet or exceed all applicable executive branch security standards." H.R. Rep. No. 5,

2. For the foregoing reasons, it is clear that the Constitution would not permit Congress to divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a "right" to furnish such information to a Member of Congress without receiving official authorization to do so. As it happens, however, appellants concede (Br. 17-18, 30, 38-39, 44-45) that subsection (3) of Section 630 does *not* confer such a right on Executive Branch employees and that subsection (4) does *not* confer a right on Congress to receive national security information. Instead, appellants concede, those subsections simply prohibit the nondisclosure agreements utilized by Executive agencies from imposing any new burden (such as a requirement of prior approval) upon the exercise of whatever preexisting right (if any) those employees might have (*e.g.*, under the First Amemdment or any statutes incorporated by subsection (5) of Section 630, such as 5 U.S.C. 7211) to furnish classified information to Congress or of whatever preexisting right Congress might have to receive it. We agree, for the reasons given by appellants (see Br. 38-40), that subsections (3), (4) and (5) confer no new substantive rights on Executive Branch personnel or Congress, and so do amici ACLU (Br. 42-43) and AFL-CIO/AFGE (Br. 10-11, 12, 26).[41]

In any event, no claim under subsection (4) of Section 630 is properly before the Court, because appellant AFSA and its

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supra, at 3. See also S. Rep. No. 522, 99th Cong., 2d Sess. 92-94 (1987). In response to these concerns, but ten months after Section 630 was enacted, the Senate adopted a Security Manual in October 1988. However, the House has not adopted a similar manual, and the Senate's Manual does not apply to individual Members.

Quite aside from the risk of disclosures from within the Legislative Branch that are not authorized by Congress itself, the President may have no practical control over whether Congress or its Houses and committees will formally release national security information that the President believes should remain confidential. For example, the rules of the Senate Intelligence Committee purport to reserve to that committee the right to decide for itself whether classified information should be disclosed, even over the objections of the President, if the full Senate agrees. See S. Res. 400, § 8, 94th Cong., 2d Sess. (1976). See also Rule XLVIII, Rules of the House of Representatives, § 7.

[41] The Senate apparently concurs in this interpretation as well (se Senate Br. 21 ("[t]he objective of subsection 3 is to protect rights that are established or recognized under [5 U.S.C.] 7211")).

members do not have standing to raise a claim concerning the "right" of Congress to receive information, and individual Members of Congress do not have standing to vindicate the rights of Congress or either of its Houses (see J.S. App. 13a-14a). Moreover, as the district court recognized (J.S. App. 26a), the requirement that Executive Branch personnel obtain prior approval before disclosing classified information to Congress does not interfere with any "right" of Congress to receive information from the Executive Branch. Any right of Congress in this regard must ultimately be vindicated through official channels, such as by the issuance of a subpoena, which will trigger a response from the agency head or other authorized official. Cf. *Touhy* v. *Ragen*, 340 U.S. 462 (1951).[42]

Insofar as subsection (3) is concerned, appellants represent (Br. 45) that they are not asking the Court to pass on the extent of what "right" employees might enjoy from *other* sources—such as the First Amendment or statutes preserved by subsection (5)—to furnish national security information to Congress.[43] The only relief they seek is an order requiring the

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[42] Amici AFL-CIO and AFGE are wrong in contending (Br. 25) that this case presents a clash between the assertion of an "implicit" right of the President and Congress's enumerated powers. Subsections (3), (4) and (5) of Section 630 must be based on Congress's power to investigate activities in the Executive Branch. But that power, which is nowhere expressed in the Constitution, is *implied* from Congress's power to make laws. See, *e.g.*, *Watkins* v. *United States*, 354 U.S. 178, 197 (1957); *McGrain* v. *Daugherty*, 273 U.S. 135, 178 (1927). As an ancillary power, it extends only so far as necessary to serve Congress's lawmaking function. By contrast, as this Court has recognized, plenary control over the disclosure of national security information is an integral component of the President's role as Commander in Chief and sole organ of the Nation in foreign affairs. Congress's implied power of investigation does not override these constitutional grants of power to the President.

Section 630 purports to be a limit on the use of appropriations, but Congress cannot accomplish by an appropriations measure what would be unconstitutional if enacted as a substantive law. See *United States* v. *Lovett*, 328 U.S. 303 (1946); Henkin, *Foreign Affairs and the Constitution* 113 (1972) ("Even when Congress is free not to appropriate, it ought not be able to regulate Presidential action by conditions on the appropriation of funds to carry it out, if it could not regulate the action directly."); *id.* at 115 ("Congress cannot impose conditions which invade Presidential prerogatives to which the spending is at most incidental"). Cf. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967); *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

[43] It is clear, however, that the First Amendment right to petition the government for redress of grievances confers no right to divulge national

appellee federal officials to notify all persons who have signed the nondisclosure agreement forms that no requirement of prior authorization can be applied to communications with Congress where the signatory has a preexisting right from another source to furnish the information to Congress or Congress has a preexisting right to receive it. See Appellants' Br. 18, 30, 38, 45, 48. But subsection (3) says nothing about furnishing notice (see ACLU Br. 26, n.17); it only bars implementation or enforcement of nondisclosure forms that interfere with whatever "right" employees might have to furnish information to Congress. And because appellants do not ask this Court to decide whether the appellee federal officials have violated such a right, there is no basis for the Court to order notice as a "remedy" for what would be at most a hypothetical statutory violation.

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security information. See pages38-39, *supra*; cf. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984); *Touhy* v. *Ragen*, 340 U.S. 462 (1951); *Connick* v. *Myers*, 461 U.S. 138 (1983). The statutory provision upon which appellants principally rely (Br. 40-41, 46), 5 U.S.C. 7211, also refers to a "right" (presumably derived from a source outside Section 7211 itself) to petition or furnish information to Congress, and this Court has indicated that Section 7211 was enacted to secure First Amendment rights (see *Bush* v. *Lucas*, 462 U.S. 367, 382-384 (1983)). It therefore likewise does not confer a right to furnish national security information to Congress.

Appellants also cite (Br. 40) the "whistleblower" protections in the Civil Service Reform Act of 1978, 5 U.S.C. 2302(b)(8). But those provisions—which in any event are enforceable only by the Special Counsel of the Merit Systems Protection Board (5 U.S.C. 1206(c)(1)(A)), not by a suit in the district court (J.S. App. 30a-31a)—do not protect disclosures of classified information even in the course of reporting waste, fraud and abuse in government. See 5 U.S.C. 2302(b)(8)(A). Rather, by not including the exception for classified information in subsection 2302(b)(8)(B), which provides for disclosures to Inspectors General or the Office of Special Counsel of the Merit Systems Protection Board, Congress evidenced an intent to limit disclosures of classified information to particular Executive Branch officials with a designated need-to-know. Although Congress also stated in the whistleblower statute that "[t]his subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress" (5 U.S.C. 2302(b), that provision does not confer an affirmative right to make such disclosures.

Finally, appellants cite (Br. 41, 46) the military whistleblower statute, 10 U.S.C. 1034, as amended by Pub. L. No. 100-456, § 846, 102 Stat. 2027. However that statute applies only to members of the armed services, and therefore would not apply to the civilian foreign service employees who are members of appellant AFSA. Moreover, as amended, Section 1034 is enforced through internal Defense Department procedures.

CONCLUSION

The judgment of the district court sustaining the validity of the nondisclosure forms and denying appellants equitable relief should be affirmed.

Respectfully submitted.

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FEBRUARY 1989

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article II of the United States Constitution provides in relevant part:

> SECTION 1. The executive Power shall be vested in a President of the United States of America. * * *
>
> * * * * *
>
> [Clause 7]. Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."
>
> SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * *
>
> [Clause 2.] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; * * *
>
> * * * * *
>
> SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient, * * * he shall receive Ambassasors and other public Ministers; he shall take Care that the Laws be faithfully executed, * * *.

2. Section 630 of Treasury Postal Service and General Appropriations Act, 1988, 101 Stat. 1329-432,[1] provides:

> No funds appropriated in this resolution or any other Act for fiscal year 1988 may be used to implement or enforce

[1] The Treasury, Postal Service and General Appropriations Act, 1988, was enacted by Section 101(m) of the Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329-390.

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No. 87-2127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION,
et al., Appellants,

v.

STEVEN GARFINKEL,
et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. Appellees' Subsequent Actions Have Not Corrected Their Prior Noncompliance With Section 630 4

II. Section 630 Does Not Violate the Doctrine of Separation of Powers 10

CONCLUSION 19

TABLE OF AUTHORITIES

Cases: **Page:**

AFGE v. Garfinkel,
(No. 87-2412-OG D.D.C.) 10

Ashwander v. Tennessee Valley Authority,
297 U.S. 288 (1936) 3

Carlucci v. Doe,
109 S. Ct. 407 (1988) 12

Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.,
333 U.S. 103 (1948) 12

CIA v. Sims,
471 U.S. 159 (1985) 12

Cole v. Young,
351 U.S. 536 (1956) 12

Department of the Navy v. Egan,
108 S. Ct. 818 (1988) 12

Haig v. Agee,
453 U.S. 280 (1981) 12

Kleindienst v. Mandel,
408 U.S. 753 (1972) 9

Little v. Barreme,
6 U.S. (2 Cranch) 170 (1804) 13

McGehee v. CIA,
718 F.2d 1137 (D.C. Cir. 1983) 14

Morrison v. Olson,
108 S. Ct. 2597 (1988) 13

New York Times v. United States,
403 U.S. 713 (1971) 13

Nixon v. Administrator of General Services,
433 U.S. 425 (1977) 3, 10, 11, 15, 17

United States v. Curtiss-Wright Export Corp.,
299 U.S. 304 (1936) 12

United States v. Munsingwear,
340 U.S. 36 (1940) 2

United States v. Nixon,
418 U.S. 683 (1974) 13

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.
425 U.S. 748 (1976) 9

Webster v. Doe,
108 S. Ct. 2047 (1988) 12

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 13

Statutes:

2 U.S.C § 194a 10

5 U.S.C § 1206(b)(1) 8

5 U.S.C § 7211 18

Foreign Intelligence Surveillance Act,
50 U.S.C §§ 1801-1811 13

Freedom of Information Act,
5 U.S.C § 552(b)(1) 13

Inspector General Act,
5 U.S.C. App. 3, § 7(a) & (b) 8

Pub. L. No. 100-352, § 1, 102 Stat. 662 (1988) 2

Executive Orders:

Exec. Order 10,450, 3 C.F.R. 936 (1949-1953 Comp.) 8

Exec. Order 12,356, *reprinted at* 50 U.S.C § 401 note 7, 14, 15, 16

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Foreign Affairs Manual (1987) 8

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The Washington Post, Feb. 15, 1989, at A25 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2127

AMERICAN FOREIGN SERVICE ASSOCIATION,
et al., Appellants,

v.

STEVEN GARFINKEL,
et al., Appellees.

REPLY BRIEF OF APPELLANTS

INTRODUCTION

Appellees advance two principal arguments in this Court as a basis for affirming the judgment below. First, appellees contend that they are in compliance with the statute as they read it. Second, appellees endorse the district court's declaration of unconstitutionality based on an extremely broad view of unimpeded executive power in national security matters — a view that would override Section 630 in its entirety, as well as numerous other laws relating to national security, no matter how they are construed. Before addressing appellees' statutory and constitutional arguments, we will examine briefly the form of judgment that appellees are asking this Court to enter.

The district court concluded that appellees had violated Section 630, but held that statute unconstitutional on its face under the doctrine of separation of powers. In this Court, appellees argue that the Executive Branch is now in compliance with Section 630, as they construe that statute, based on the actions that they have taken in the months following the district court's decision. Based on these subsequent actions, appellees assert

that "[t]he judgment of the district court sustaining the validity of the nondisclosure forms and denying appellants equitable relief should be affirmed." Appellees' Br. at 51.

Appellees' request for affirmance on this basis should be rejected because the district court did not pass on the validity of the amended SF 189 or SF 4193 forms or on whether appellants were entitled to equitable relief. Rather, the district court issued a sweeping declaration that Congress has no power to enact legislation regulating disclosure of national security information. Accordingly, even if events that occurred after the district court decision have brought appellees into compliance with Section 630 (which we dispute), the appropriate remedy would be to vacate the district court's judgment rather than to affirm it, since appellees' subsequent compliance would have deprived appellants of the opportunity to have that ruling reviewed. *United States v. Munsingwear*, 340 U.S. 36 (1940).

There are several reasons, however, why the Court should not vacate the judgment below as moot and order the complaint dismissed, but instead should vacate (or reverse) the judgment and remand the case for further proceedings. First, appellees' assertion that they are in compliance with Section 630 based on their subsequent actions depends on numerous facts that are not in the record, including several actions that have been construed in conflicting ways by different parties and *amici*. While we disagree that these subsequent actions have remedied the violations of Section 630 caused by the unlawful use of the banned forms, we recognize that it would be more appropriate for the district court to rule on these issues in the first instance on the basis of a fully developed record, with any further appeal going to the court of appeals rather than directly to this Court. *See* Pub. L. No. 100-352, § 1, 102 Stat. 662 (1988) (eliminating direct appeal jurisdiction).

Second, the district court prematurely declared every aspect and application of the statute unconstitutional without first

finding violations of each of Section 630's requirements. This approach violates the time-honored principle that courts are to decide constitutional questions only when required to do so by the precise facts of the case. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring in part, dissenting in part). Accordingly, as part of its remand order, the Court should direct the district court first to decide whether appellees are still in violation of each of Section 630's provisions, and then and only then reach the question of whether those provisions as applied violate the doctrine of separation of powers.

Third, the district court erred in declaring the entire statute unconstitutional without any evidence that its provisions impair the Executive Branch's ability to carry out its constitutional functions, as required by *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). As a practical matter, the district court's unprecedented ruling that Congress has no power to enact any portion of Section 630, including even its ban on use of the term "classifiable," acts as an insurmountable barrier to any judicial review of appellees' compliance with Section 630 on remand. Accordingly, appellants ask this Court to vacate or reverse the district court judgment and remand the case with instructions to the district court to decide only those constitutional issues that are implicated by the facts of this case under the standards set forth in *Nixon v. GSA*.

Given the history of this litigation, it is entirely likely that a remand will lead the political branches to take additional actions to resolve this dispute that they have been unwilling or unable to take in the face of the district court's blanket declaration of unconstitutionality. Therefore, once this obstacle is removed by an order vacating or reversing that decision, further accommodation between the political branches may obviate the need for resolution of the constitutional issues by the district court, let alone by this Court.

I. Appellees' Subsequent Actions Have Not Corrected Their Prior Noncompliance With Section 630.

Appellees no longer contend that their actions prior to the district court's decision complied with Section 630. Instead, they urge the Court to find that their subsequent actions have brought them into compliance with Section 630. However, upon close examination, it is clear that appellees have not fully corrected their past violations of the statute, and that there is, at a minimum, sufficient evidence to warrant a remand to resolve whether these violations have been remedied.

A. The district court concluded that appellees had violated Section 630's express ban on the implementation of Standard Forms 189 and 4193. App. 22a n.16. Because it is undisputed that appellees continued to require employees to sign those very forms, the court never had to decide whether the forms contained any of the five provisions also prohibited by Section 630 in order to find a violation. Although appellees have now ceased requiring employees to execute SF 189 and SF 4193, thereby rendering appellants' request for an injunction to that effect moot, approximately 49,000 of these forms were executed during the funding ban in direct violation of Section 630. *Congress & the Administration's Secrecy Pledges: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 100th Cong., 2d Sess. 166, 173, 188 (1988) ("1988 Hearing") (GAO Testimony). Therefore, the question is whether appellees' subsequent actions have remedied the harm caused by the illegal execution of these 49,000 forms.

After the district court declared the term "classifiable" unconstitutionally vague, appellees sent a notice to those signatories who were still employed by the federal government, informing them that the term "classifiable" had been deleted from SF 189 and SF 4193 and that a new definition of protected information had been added. However, appellees did not provide any such

notice to signatories who were illegally required to sign the forms after the December 1987 ban, but who since have left government service. *See* Appellees' Br. at 31 n.24. Because these former employees, who may number in the thousands, have never been apprised that appellees will no longer enforce the ban on disclosures of "classifiable" information, they are still chilled from making such disclosures, and appellees' violation of the ban on the use of the term "classifiable" has not been remedied and hence is not moot as to them.[1]

B. Second, appellees' corrective notice does not bring the SF 189 and SF 4193 forms into compliance with Section 630 even as to those employees who received the notice because it expressly states that employees are liable for disclosures of information that they know *or have reason to know* is classified or being classified, even though it is unmarked. This "reason to know" standard is inconsistent with Section 630(1), which limits nondisclosure forms to unmarked information that the employee knows is either classified or being classified.[2]

As the congressional hearing in support of the renewal of Section 630 makes clear, the actual knowledge standard was

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[1]Contrary to appellees' contention at footnote 24 on pages 31-32, appellant American Foreign Service Association has standing to litigate this claim since its members include both current and retired foreign service officers, and the complaint sought an order directing the Secretary of State "to treat all SF 4193 agreements executed on or after December 22, 1987, as void, and to notify *all* State Department *signatories* that such agreements are void." J.A. 10 (emphasis added).

[2]Appellees' issuance of SF 4355 and SF 312 did not alter this controversy because employees have not executed the new forms in place of the forms signed in violation of Section 630. Moreover, although the new forms and their implementing regulations were not challenged in this complaint, they also violate Section 630's actual knowledge requirement, which is a further reason why this aspect of the case is not moot.

included to ensure both that the uncertainty surrounding the term "classifiable" could not be reintroduced through a backdoor device and that would-be-whistleblowers could not be required to consult with their superiors before disclosing unclassified, but embarrassing, information. 1988 Hearing at 21 (Rep. Boxer); *id.* at 67, 75-76 (Sen. Grassley); Comm. on Gov't Operations, *Legislation Needed to Curb Secrecy Contracts*, H.R. Rep. No. 911, 100th Cong., 2d Sess. 10 n. 36, 19-20 (1988). However, the "reason to know" standard can be used to do precisely what Congress tried to prevent. Because "reason to know" has no fixed meaning in this context, it leaves agency decisionmakers with essentially unfettered discretion to create unreasonable obligations. As a result, signatories do not know in advance the circumstances in which they will be deemed to have sufficient knowledge to subject them to the forms' requirements.

Appellees' brief confirms the ambiguity inherent in their "reason to know" standard. On the one hand, appellees attempt to equate it with negligence, suggesting that it has both a defined and narrow meaning. *See* Appellees' Br. at 16, 17, 28, 34, 35, 36, 37, 39. In other places, however, they define this standard in extremely broad terms that go far beyond negligence. Thus, appellees contend that "[i]f the employee has *any doubt* about whether particular information may be disclosed, he must err on the side of nondisclosure and inquire about the classified status of the information." *Id.* at 38 (emphasis added). Elsewhere, appellees suggest that this duty to inquire arises *whenever* an employee is uncertain about the status of information or *whenever* an employee has *reason to believe* that information *might* be classified. *See* Appellees' Br. at 39-40; *accord* Sen. Br. at 17-18.

Under the "any doubt" standard, as well as the latter tests, a supervisor could determine that an employee has an obligation to confirm that any unmarked information is not classified or being classified whenever it could "conceivably" be classified. Since any information that "concerns . . . foreign relations or

foreign activities of the United States" may be classified under Executive Order 12,356, § 1.3(a)(5), foreign service officers could rarely have no doubt that unmarked information has not been classified, particularly in light of the persistent problem of government overclassification of records. *See, e.g.*, Information Security Oversight Office, *Annual Report to the President FY 1987*, at 28 (1988) ("ISOO Report") (between 4.9% and 7.6% of sample documents unnecessarily classified in whole or in part); The Washington Post, Feb. 15, 1989, at A25 (former Solicitor General Erwin N. Griswold stating there has been "[no] trace of a threat to national security from the publication" of the previously top secret Pentagon Papers). Therefore, given the breadth of the "any doubt" standard, appellees are mistaken in their assertion that the old forms as amended by the corrective notice "will be fully understood by the signatories to apply only to those categories of information that are at the core of the President's constitutional duty to protect the national security." Appellees' Br. at 31.

To the contrary, by requiring employees to check with their supervisors whenever they have "any doubt" that unmarked information might be classified or in the process of a classification determination, the forms impose a prior restraint on disclosures of a vast range of unclassified information. Consequently, retired foreign service officers may be deterred from writing articles or giving speeches about foreign policy matters. In addition, while "the employees' inquiry presumably will produce a clear answer about the current status of the information," Appellees' Br. at 40, it may also lead to retaliation against the employee who thereby indicates that he or she plans to disclose information about illegal or embarrassing agency activities. *See* 1988 Hearing at 67, 75-76 (Sen. Grassley expressing fear that this would occur).

In this way, the "reason to know" standard directly impedes the confidentiality that Congress believed is essential to encour-

age whistleblowing about such matters as defective military weapons, budget overruns, and fraudulent purchasing practices. *See* 5 U.S.C. § 1206(b)(1); Inspector General Act, 5 U.S.C. App. 3, § 7(a) & (b). As a result, an employee who would like to blow the whistle on such conduct may instead choose to follow the safer course and keep quiet, particularly since he or she has little recourse in the event an inquiry results in a security clearance revocation. *See* Exec. Order 10,450, 3 C.F.R. 936 (1949-1953 Comp.); 3 Foreign Affairs Manual § 163.4 (1987). Therefore, although the deletion of the term "classifiable" and use of the substitute language has removed the prospect of after-the-fact classifications as a means of punishing whistleblowers, it has not eliminated the kind of uncertainty and chill that Congress sought to eliminate in subsections 1 and 2 of Section 630. At a minimum, there is sufficient ambiguity about the meaning and effect of the "reason to know" standard and whether use of that standard complies with Section 630 to warrant remanding the case so that the district court can consider this issue in the first instance based on a full and current factual record.

C. Appellants also contended below that the nondisclosure agreements violated subsections 3 and 4 of Section 630 because they require employees to obtain prior authorization before communicating any classified information to a Member or committee of Congress. *See infra* at 9 n. 3. This requirement stems from the forms themselves, which prevent disclosures of classified information except to "authorized" persons, and from statements made by appellee Garfinkel that Members of Congress are not "authorized" to receive classified information by virtue of their status as Members of Congress. Appellees' Br. at 47 n.38. Moreover, appellees' brief plainly reveals that they do not consider Members of Congress authorized to receive classified information without prior approval, Appellees' Br. at 46-48 & n.38, and nothing in the notice sent to the employees who signed SF 189 or SF 4193 or in the new forms even arguably

brings those forms into compliance with these provisions of Section 630.[3]

Before this Court, the House takes the position that, under these forms, Members and committees of Congress should be considered authorized recipients of classified information by virtue of their elected status, House Br. at 14, and the Senate believes that this is an open question. Sen. Br. at 19; *see also* ACLU Br. at 46. However, the Executive Branch, which is the branch that matters for this purpose, takes the contrary position, *i.e.*, that Members are never authorized to receive particular classified information unless and until an Executive Branch official has decided that they have a need-to-know that particular information. Appellees' Br. at 46-48 & n.38. Under this interpretation, an employee could be fired for failing to obtain prior permission to provide a congressional committee information that the Executive Branch has an obligation to report, or for telling the committee that Executive Branch officials have lied about or withheld such information. It would also undercut a foreign service officer's statutory right to "express his views and opinions, and make recommendations he considers appropriate" in response to a request from a congressional committee or

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[3]Appellees mistakenly assert that appellants sought relief without first asking the district court to find that the forms violate this portion of the statute. *See* Appellees' Br. at 17, 50. In fact, appellants contended below that SF 189 and SF 4193 violated this aspect of Section 630, although the district court made no findings on this point. J.A. 7-8, 37; Proposed Findings of Fact ¶¶ 25-27. Similarly, contrary to appellees' suggestion at pages 48-49, AFSA has standing to challenge appellees' noncompliance with subsection 4, which protects Congress' right to obtain information, because Congress can obtain information from Executive Branch employees in the manner protected by Section 630 only if those employees, whom AFSA represents, can safely exercise their rights to provide it. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972).

committee member that relates to a subject within the committee's jurisdiction. *See* 2 U.S.C. § 194a.

We recognize that, despite this evidence that strongly suggests that the Executive Branch is acting contrary to Section 630, the district court did not make any explicit findings to that effect. Because the district court erred in declaring subsections 3, 4, and 5 unconstitutional without first finding violations of those provisions, the Court should remand the case to the district court to determine the precise manner in which the prior authorization requirement applies to Members of Congress, the extent to which it conflicts with Section 630, and if so, whether this aspect of Section 630 is unconstitutional under *Nixon v. GSA*, assuming that no accommodation can be reached between the branches that would resolve this dispute.[4]

II. Section 630 Does Not Violate the Doctrine of Separation of Powers.

Not only did the district court err in prematurely addressing the constitutionality of Section 630 in its entirety without first finding violations of each of its provisions, but it also based its

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[4]The American Civil Liberties Union erroneously contends that appellants neither alleged violations of subsections 1, 3, 4, and 5, nor asserted that these violations chill employees from making protected disclosures. *See* ACLU Br. at 21-22, 29-37 & nn. 22 & 23, 39. Not only did appellants allege and introduce evidence to show that SF 189 and SF 4193 violated subsections 1, 3, 4 & 5, *see* J.A. 7-8; Proposed Findings of Fact and Conclusions of Law ¶¶ 16, 25-27, 77-79, but they even challenged SF 4355's noncompliance with subsections 1, 3, 4 & 5 after it was issued. *Id.* ¶¶ 17, 52, 53, 80-84; Plaintiffs' Mem. in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Motion for Summary Judgment at 5-9 (filed in consolidated cases April 1, 1988); Declaration of Louis C. Brase at 1-3 (filed in one of the consolidated cases, *AFGE v. Garfinkel*, No. 87-2412-OG, April 11, 1988).

declaration of unconstitutionality on a wholly indefensible view of Congress' power in this area and without finding that the statute, as applied, impairs the Executive Branch's ability to perform its constitutional functions, as required by *Nixon v. GSA*. For this reason as well, the district court's judgment should be reversed (or vacated), and the case remanded for further proceedings.

A. Appellees advance a theory of presidential power under which any congressional action that limits in any way the power of the Executive Branch in the area of national security or foreign affairs is unconstitutional. Like the district court, they take the position that Congress can exercise no legislative control over the Executive Branch's handling of national security information, but can only facilitate civil and criminal sanctions and try to obtain information through official cooperation and subpoena battles, but through no other means. Appellees' Br. at 26-27, 37 n.28, 49; App. 23a, 26a.

This view of presidential omnipotence pervades appellees' brief. Thus, appellees contend "that the President's roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have *ultimate and unimpeded authority* over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch." Appellees' Br. at 42 (emphasis added throughout paragraph). Similarly, according to appellees, "[j]ust as the President's roles as Commander in Chief and representative of the Nation in its foreign relations *bar Congress from erecting legislative impediments to his full assumption of personal authority for national security matters*, so too do those roles bar Congress from erecting such impediments to Presidential control over national security information." Appellees' Br. at 27 (citation omitted). For essentially the same reasons, they argue that the President "must have *direct and unimpeded control over the national security information* whose

confidentiality he deems necessary to the successful performance of his duties." *Id.* at 25; *accord id.* at 22 (contending that there is a "constitutional requirement that the President at all times retain control over the implementation of whatever substantive measures the Constitution authorizes Congress to enact in the area of national defense and foreign relations"); *see also id.* at 15, 17, 22, 26, 35-36, 42, 49 n.42.

Appellees' theory of separation of powers — which wholly disregards Congress' legislative authority as well as its independent power to impose conditions on or to withhold appropriations — is entirely without support. In fact, every one of the cases that appellees cite for the proposition that Congress is precluded from enacting legislation in this area concerned Executive Branch authority in furtherance of, or pursuant to, a congressional delegation of authority. *See Department of the Navy v. Egan*, 108 S. Ct. 818 (1988); *CIA v. Sims*, 471 U.S. 159 (1985); *Haig v. Agee*, 453 U.S. 280 (1981); *Cole v. Young*, 351 U.S. 536 (1956); *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). These cases do not support the Executive Branch's contention that it can act contrary to a statute like Section 630, and this Court has *never* upheld an Executive Branch action in the foreign affairs or national security area that contravened a specific act of Congress. Indeed, if appellees were correct in their theory of unfettered executive power over national security matters, including security clearance determinations, then this Court erred in deciding *Webster v. Doe*, 108 S. Ct. 2047 (1988), as it did, and it engaged in an empty exercise in construing the statutes at issue in *Egan* and *Carlucci v. Doe*, 109 S. Ct. 407 (1988), since the outcomes in those cases were constitutionally ordained.

In other contexts as well, this Court has refused to accord absolute deference to Executive Branch determinations on national security matters, which, under appellees' theory, it had an

obligation to do. *See United States v. Nixon*, 418 U.S. 683 (1974); *New York Times v. United States*, 403 U.S. 713 (1971)(concurring opinions of Justices White, Stewart, Marshall, Black & Douglas); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). Not only does appellees' argument conflict with the decisions of this Court, but it also ignores the specific authority granted to Congress in the Constitution to act in the areas of foreign affairs and national security through its legislative, appropriations, and other powers. *See* Opening Br. at 22-25; AFL-CIO Br. at 13-15.

Appellees' argument is also undercut by this Court's decision in *Morrison v. Olson*, 108 S. Ct. 2597 (1988). In that case, the Executive Branch made a similar argument that the Constitution required that the President have unimpeded control over the appointment, direction, and removal of all prosecutors. United States *Amicus Curiae* Brief in *Morrison v. Olson* at 3, 5-16. However, this Court rejected those arguments and upheld the independent counsel statute, which places significant limits on the President's power over independent counsel. *Morrison*, 108 S. Ct. at 2617-19, 2620-22. Accordingly, just as it rejected the Executive Branch's absolutist position in *Morrison*, the Court should reject the equally absolutist argument made by appellees here.

If, as appellees contend, Congress cannot impede the Executive Branch's ability to act in the area of national security and foreign affairs, Congress would be precluded from passing any statute limiting the use of any terms in nondisclosure agreements, including unconstitutionally vague terms like "classifiable." It would also invalidate the portion of the national security exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(1), which allows district courts to review classification determinations. *See also* Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1811 (requiring judicial authorization for foreign intelligence surveillance for more than one year);

McGehee v. CIA, 718 F.2d 1137 (D.C. Cir. 1983) (authorizing judicial review of Executive Branch prepublication review determinations to ascertain whether withheld information is both actually and properly classified). Moreover, under appellees' theory, Congress could not provide any protections, even purely procedural ones, for employees who stand to lose their security clearances because the President must have direct and unimpeded control over all such matters.

Why appellees urge such an all-encompassing theory of presidential power in this case, or what that theory has to do with the modest requirements of Section 630, is not apparent. Indeed, despite the claimed basis for the application of this theory here — that the President himself must exercise control over all national security information and over all employees who have access to it — Section 630 operates principally on people and information that never implicate presidential prerogatives. Appellees' Br. at 19-21 & n.17, 25, 42. This is confirmed by the fact that 10,000,000 new classification decisions are made annually, ISOO Report at 1, 6, 9, that the number of current and former employees covered by the nondisclosure forms reached nearly 3,000,000 at last count, 1988 Hearing at 156-66, 170-71, 187, and that the challenged nondisclosure forms are used by agencies such as the Interstate Commerce Commission, the Marine Mammal Commission, the Federal Communications Commission, and the Securities and Exchange Commission, which are independent of the President and have limited access to classified information. GAO, *Information & Personnel Security: Data on Employees Affected by Federal Security Programs* 8 (1986).

Moreover, the challenged terms of the nondisclosure forms did not even emanate from the President; neither Executive Order 12,356 nor National Security Decision Directive-84, both of which the President did issue, call for use of the terms that have been forbidden by Section 630, nor do they mandate a prior

authorization requirement for disclosures to Congress. Exec. Order 12,356, § 4.1(a) & (c) (Congress may have access to classified information "for the accomplishment of lawful and authorized Government purposes" without any mention of prior authorization); *id.* § 5.4(b)(1) (sanctions only for disclosure of properly classified information); J.A. 11 (same). As we explained in our opening brief at 20-30, there is no basis in the Constitution or this Court's decisions for such a broad claim of presidential supremacy regarding national security information, and the district court's acceptance of this claim was plainly in error.

B. Aside from their general and unsupported theory of unlimited presidential power, appellees offer no specific constitutional justification for the use of the term "classifiable," and make no attempt to comply with *Nixon v. GSA* by showing how banning use of that term has impaired the Executive Branch. Appellees also make only the slightest effort to establish such an impairment with respect to the knowledge requirement of Section 630, but in attempting to do so they misstate the effect of the law. Thus, while appellees argue that subsection 1's knowledge requirement prevents the Executive Branch from taking any action to punish an employee who makes negligent disclosures of unmarked classified information, Appellees' Br. at 16, 34-35, 36-37, 39, that is not what Section 630 does.

Section 630 was aimed at the Executive Branch's attempt to impose new obligations on federal employees by making them sign nondisclosure agreements that give the Executive Branch a host of new legal remedies. Thus, although Section 630 forbids the creation of certain new contractual obligations, it does not alter whatever remedies the Executive Branch may otherwise have at its disposal by virtue of statutes, executive orders, or even its inherent authority. If, for example, the Executive Branch has some other authority to deny an employee access to classified information or to revoke an employee's security clearance for

improperly disclosing unmarked information, that authority survives Section 630.

The question then is whether banning a contractually based "reason to know" standard unconstitutionally impairs the Executive Branch's ability to carry out its constitutional functions. Aside from the fact that appellees offered no evidence that contracts containing a "reason to know" standard are necessary to safeguard national security information, there are few, if any, situations in which the actual knowledge standard could result in classified information being disseminated for two reasons.

First, Section 630 imposes no knowledge requirement for information that is marked classified. Since the vast majority of classified information is so marked, as required by Executive Order 12,356 and agency regulations and directives, employees may be held responsible even under Section 630 for the unauthorized disclosure of most classified information without any proof that they knew it was classified.

Second, in virtually all situations in which information subject to the nondisclosure forms is not marked classified, the employee will know (or the Executive Branch can ensure that the employee will know) that the information is either classified or in the process of a classification determination. Thus, employees who have access to raw intelligence or to classified briefings are presumably told about the classified nature of that information. Similarly, employees who generate unmarked notes of a classified briefing, or who are given a manuscript that has not yet undergone prepublication review, would actually know that such information must be safeguarded and that they have a duty to ensure that others who have access to it are instructed likewise. Thus, there are likely to be few, if any, situations in which the absence of a contractually based "reason to know" standard will prevent an employee from being disciplined for improperly handling classified materials.

Moreover, even if there is some disruption of the Executive

Branch, *Nixon v. GSA* requires the Court to balance that disruption against Congress' interest in imposing this limitation. In enacting Section 630's knowledge requirement, Congress made a choice as to whether the Executive Branch or federal employees should bear the burden of ensuring that employees know whether unmarked information may not be disclosed — a choice that is well-suited to a legislative determination. While the Executive Branch would prefer to have employees bear that burden by imposing a contractual duty to inquire whenever they have "any doubt" about the status of information, it is not unconstitutional for Congress to place that burden on the Executive Branch, which has control over the marking of classified records and the briefing of employees who have access to classified information that may not be marked or information that is in the process of a classification determination. The Executive Branch has not argued, let alone produced any evidence to show, that bearing this burden significantly impairs its ability to function, particularly since it has unimpeded authority under Section 630 to establish the standards governing both classification determinations and the instructions that are conveyed to federal employees.

C. Finally, there is no dispute over the effect of subsections 3, 4, and 5, which all parties and *amici* agree do not change the existing rights of Congress and Executive Branch, but merely prevent the Executive Branch from imposing additional burdens on the exercise of such rights through nondisclosure forms. Since these provisions simply maintain the status quo, they do not impair the Executive Branch's ability to carry out its constitutional functions, and there is no basis for appellees' constitutional attack on them.

In a footnote, appellees urge the Court to decide that subsections 3, 4, and 5 are unconstitutional by contending that federal employees have no right to disclose any classified information to a Member or committee of Congress under the First Amendment

right to petition, 5 U.S.C. § 7211, or any other statute. Appellees' Br. at 49-50 n.43. In making this argument, appellees allow no exceptions for information that is subject to a mandatory reporting requirement, that pertains to waste, fraud, or illegal conduct, or that is provided to a Member or a congressional committee with jurisdiction over the underlying subject matter and with adequate security to safeguard the information. Indeed, appellees' position would prevent Congress from passing any law ensuring its own access to national security information without prior Executive Branch approval. However, the Court need not decide whether Congress is barred from passing any such laws because, as the parties and *amici* agree, Section 630 merely forbids the Executive Branch from unilaterally imposing additional obstacles on the exercise of existing rights, and that requirement is plainly constitutional.

CONCLUSION

For the foregoing reasons and those set forth in appellants' opening brief, this Court should vacate or reverse the district court's judgment and remand the case for further proceedings.

Respectfully submitted,

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On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO AS *AMICI CURIAE* SUPPORTING APPELLANTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
ARGUMENT	2
Introduction and Summary of Argument	2
1. Section 630	7
a. Congress' Purposes	7
b. The Scope of the Constitutional Dispute	11
2. The Powers of Congress	12
3. The Powers of the President	20
4. A Note on the Interdependence of the Legislative and Executive Branches	27
CONCLUSION	28

TABLE OF AUTHORITIES

Cases Page

Bowsher v. Synar, 478 U.S. 714 (1986) 2
Buckley v. Valeo, 424 U.S. 1 (1976) 2
Bush v. Lucas, 462 U.S. 367 (1983) 10, 18
Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948) 4
Cincinnati Soap Co. v. U.S., 301 U.S. 308 (1937) 15
Dames & Moore v. Regan, 453 U.S. 654 (1981) 4
Department of Navy v. Egan, —— U.S. ——, 108 S.Ct. 818 (1988) 4
Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) 19
Embry v. United States, 100 U.S. 680 (1879) 14
Haig v. Agee, 453 U.S. 280 (1981) 5
Humphrey's Executor v. United States, 295 U.S. 602 (1935) 17
INS v. Chadha, 462 U.S. 919 (1983) 2
Kendall v. United States, 37 U.S. 524 (1837) 18
Knote v. United States, 95 U.S. 149 (1877) 15
Little v. Barreme, 6 U.S. 170 (1804) 5
Morrison v. Olson, —— U.S. ——, 108 S.Ct. 2597 (1988) 17, 25
Myers v. United States, 272 U.S. 52 (1926) 2
Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 4, 6, 24, 26
Nixon v. Fitzgerald, 457 U.S. 731 (1982) 10
Reeside v. Walker, 52 U.S. 272 (1850) 13
United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936) 4
United States v. Lovett, 328 U.S. 303 (1946) 15, 16
United States v. Nixon, 418 U.S. 683 (1974) 3
United States v. Perkins, 116 U.S. 483 (1886) 18
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 4, 5, 27
Zemel v. Rusk, 381 U.S. 1 (1965) 4

Constitutional Provisions, Statutes and Regulations

U.S. Constitution
Article I, § 8 ..... *passim*
Article I, § 9 ..... 13, 16

TABLE OF AUTHORITIES—Continued

	Page
Article II, § 7	14
Article III, § 1	14
5 U.S.C. § 2302(b)	9
5 U.S.C. § 7211	10
Treasury, Postal Service and General Appropriations Act of 1989, § 619, Pub. L. No. 100-440, 102 Stat. 1721 (September 22, 1988)	2
Military Whistleblower Protection Act, Pub. L. No. 100-456, § 846, 102 Stat. 2027 (September 29, 1988)	10
Omnibus Continuing Resolution for Fiscal Year 1988, § 630, Pub. L. No. 100-202, 101 Stat. 1329 (Dec. 22, 1987)	*passim*
32 C.F.R. § 2003.20(h)(1)(i)	11, 12
32 C.F.R. § 7003.20(b)	11
53 Fed. Reg. 38279	11

Legislative History

Classified Information Nondisclosure Agreements: Hearings before the House Subcomm. on Human Resources of the Comm. on Post Office and Civil Service, 100th Cong. 1st Sess. 8 (October 15, 1987)	9, 16
Congress and the Administration's Secrecy Pledges: Before a Subcomm. of the House Comm. on Government Operations, 100th Cong., 2d Sess. 169-171 (August 10, 1988)	8, 10, 13
H. Conf. Rep. No. 100-398, 100th Cong., 1st Sess. 1179 (December 22, 1987)	9
133 Cong. Rec. H11999 (Daily ed. December 21, 1987)	9

Books and Articles

Black, *The Working Balance of the American Political Departments*, 1 Hast. Constit. L.Q. (1974)	28
The Federalist No. 41 (J. Madison) (C. Rossiter ed. 1961)	23

TABLE OF AUTHORITIES—Continued

Page

The Federalist No. 51 (J. Madison) (C. Rossiter, ed. 1961) 6
The Federalist No. 58 (J. Madison) (C. Rossiter, ed. 1961) 13, 14
The Federalist No. 64 (J. Jay) (C. Rossiter, ed., 1961) 24
The Federalist No. 73 (A. Hamilton) (C. Rossiter, ed. 1961) 14
H. Hallan, *The Constitutional History of England* 533-534 (1873) 13
L. Henkin, *Foreign Affairs and the Constitution* 76 (1972) 19
Note, *The War-Making Powers: The Intentions of the Framers in the Light of Parliamentary History*, 50 B.U.L. Rev. 5, 6-8 (1970) 13
Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 667 (1984) 17
T. Tasswell-Langmead *English Constitutional History* 428-429 (11th ed., T. Plucknett, 1960) .. 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2127

AMERICAN FOREIGN SERVICE ASSOCIATION, *et al.*,
Appellants,

v.

STEVEN GARFINKEL, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO AS *AMICI CURIAE* SUPPORTING APPELLANTS

This brief *amici curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 90 national and international unions with a total membership of approximately 13,000,000 working men and women, many of whom are government employees directly affected by the statute at issue in this case. The American Federation of Government Employees, AFL-CIO ("AFGE"), is the national union affiliated with the AFL-CIO which specializes in representing federal employees.

ARGUMENT

Introduction and Summary of Argument

This case turns on the constitutionality of an act of Congress which prohibits the use of appropriated funds for certain purposes: § 630 of the Omnibus Continuing Resolution for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (Dec. 22, 1987) (hereinafter "§ 630").[1] More specifically, the question is whether the constitutional doctrine of separation of powers denies Congress the power to enact § 630. Such a ruling would be wholly unprecedented for the simple and compelling reason that judicial invalidation of such an enactment would be at odds with the most basic premises of our constitutional scheme.

It is beyond doubt that the grant of legislative powers to Congress in Article I of the Constitution on its face authorizes the passage of § 630. As we discuss *infra* at 12-20, that authority is stated in a number of Article I's express provisions. It is equally plain that in this instance Congress has not violated the separation of powers scheme by attempting to participate directly in the function of executing the laws, *see e.g., Bowsher v. Synar*, 478 U.S. 714 (1986); *Buckley v. Valeo*, 424 U.S. 1, 109-143 (1976); *Myers v. United States*, 272 U.S. 52, 161 (1926), or by attempting to circumvent the Constitution's specific procedural requirements for proper legislative action, *see, e.g., INS v. Chadha*, 462 U.S. 919, 944-959 (1983).

Rather, in § 630, Congress has, in order to accomplish proper legislative objectives, simply placed a straight-

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[1] As a provision relating to appropriations for Fiscal Year 1988, § 630 effectively expired at the end of that Fiscal Year. However, Congress reenacted—and the President signed—an identical provision for Fiscal Year 19[illegible]. *See* Treasury, Postal Service and General Appropriations Act[illegible] 1989, § 619, Pub. L. No. 100-440, 102 Stat. 1721 (September 22, 1988). For convenience, both of these provisions will hereinafter be referred to as "§ 630."

forward limit on the Executive's uses of congressionally-appropriated funds: generally stated, that limit is designed to facilitate the free flow of non-classified information about the workings of our federal government, and to eliminate procedural obstacles to Congress' access to both classified and nonclassified information that Congress reasonably believes is necessary in carrying out its constitutionally assigned functions.

In this context, to strike down § 630 as unconstitutional, this Court would have to conclude that Congress' established legislative power is overridden by a superior power granted by the Constitution to the Executive. Moreover, because the Constitution does not expressly grant any such executive power, *see infra* at 23, the Court would have to *imply* a superior executive power that overrides the *express* powers granted to Congress in the Constitution. Not surprisingly, in the two centuries of our constitutional history, this Court has never sought to limit Congress' role in that fashion.

The power of the President sought to be invoked in this case as the base for overriding the power of Congress to enact § 630 is the power to conduct foreign relations and to protect national security. Specifically, the Government argues that as an incident of this presidential power, the Executive must—as a constitutional matter—have a free hand to control the flow of certain types of foreign relations and national security information as the Executice chooses, without any interference from Congress.[2]

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[2] The Government's argument for the President's exclusive and inherent authority to control the flow of information in these areas regardless of the will of Congress rests entirely on the assertion that such authority is implicit in the foreign relations and national security powers vested by the Constitution in the President. The Government's position is not based on the qualified privilege of confidentiality for high level executive deliberations. *See United States v. Nixon*, 418 U.S. 683, 705-707 (1974) (noting the qualified need

While this Court has from time to time alluded to an "inherent" or "independent" presidential power to conduct foreign relations and to protect national security, the context has always been presidential conduct pursuant to congressional authorization or wholly compatible with congressional enactments.[3] It does not strain the constitutional scheme one whit to recognize that in the area of foreign policy only the Executive branch has the power to execute—which means the power to conduct the functions of international discourse, negotiation, and war-making—and to recognize that Congress may, "in giving the Executive authority over [these] matters[,] . . . paint with a brush broader than that it customarily wields in domestic areas."[4] And, it may well be the constitutional plan with regard to foreign relations and national security to provide the Executive—at least in the absence of relevant legislative acts—a somewhat greater power of initiative in the formulation and implementation of policy than with regard to wholly domestic matters.[5]

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for confidentiality of high-level executive deliberations); *see also Nixon v. Administrator of General Services*, 433 U.S. 425, 456-55 (1977) (discussing privilege and its qualified nature).

[3] *See, e.g., Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948); *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936). *Accord, Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 & n.2 (1952) (Jackson, J. concurring) (noting that *Chicago & Southern Air Lines, supra*, and *Curtiss-Wright* were both cases in which the presidential acts in question were "pursuant to an express or implied authorization of Congress"). *See also Department of Navy v. Egan*, —— U.S. ——, 108 S.Ct. 818 (1988) (noting broad presidential power over national security information in case where congressional enactments were *not* intended to limit presidential power).

[4] *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *see also Dames & Moore v. Regan*, 453 U.S. 654, 677-679 (1981).

[5] *See, Department of Navy v. Egan, supra*, 108 S.Ct. at 825 ("unless Congress specifically has provided otherwise, courts tradi-

But it in no way follows that the presidential power to conduct foreign policy and to protect national security is beyond regulation by Congress pursuant to the congressional powers conferred by Article I. This Court has never taken that quantum doctrinal leap—indeed, in the past, has declined to do so[6]—yet it is just such a departure in our constitutional jurisprudence that would be required to strike down § 630.

In his seminal concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-638 (1952), Justice Jackson—analyzing an earlier presidential claim to "inherent" national security powers that could operate in the face of a contrary congressional will—put the issue framed here in proper constitutional perspective:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. [*Id.* (footnote omitted)]

With regard to matters of the kind at issue here, the Founders provided for the "equilibrium" to which Justice Jackson refers not by attempting to capture the

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tionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); *Haig v. Agee*, 453 U.S. 280, 291 (1981) ("in the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval").

[6] *See Little v. Barreme* 6 U.S. 170 (1804) (Marshall, C.J.); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 660 (1952) (Clark, J. concurring).

future by a set of rigid, definite rules for allocating power, but by establishing a creative competitive tension between Congress and the President that serves as the means of "keeping each other in their proper places." The Federalist No. 51 (J. Madison) (C. Rossiter, ed. 1961) at 320. It is through this political process—using the term political in its highest sense—that the shape of our government at the levels below the President and the shape of the policies of our Nation are to be formed.

The separation of powers concept most emphatically "did not mean that [the branches] ought to have . . . no *controul* over the acts of each other." *Nixon v. Administrator of General Services*, *supra*, 433 U.S. at 442, n.5 (quoting The Federalist No. 47 (J. Madison) (emphasis in original)). Any constitutional rule that would create a significant area of federal policy-making where the Executive has *exclusive* control, thereby truncating Congress' ability to exercise its express legislative powers, is far removed from the constitutional scheme. As long as Congress is acting in a legislative capacity as defined in Article I and the President is operating in an executive capacity as defined in Article II, only the most extreme circumstance could justify judicial intervention through the separation of powers doctrine.

The present case most assuredly does not meet that measure. As we show below, Congress in adopting § 630 acted well within its constitutionally assigned sphere. And, where Congress acts pursuant to its conferred powers, by definition the legislature is not acting in an area exclusively given to the President. As we further show, § 630 could not conceivably disrupt the ability of the President to carry out his constitutionally assigned functions. Indeed, § 630 does not even purport to alter the categories of information that the Executive may "classify." Nor does § 630 enlarge either the right of any government employee to disclose classified information or the right

of Congress to receive such information. The intended effect of § 630 is simply to prevent the Executive from chilling or obstructing the flow of information already permitted by pre-existing laws.

1. Section 630

The parties and other *amici curiae* will set forth in detail the legislative and administrative background to the enactment here and its implementation. It is important, however, that these details not obscure the purposes Congress sought to further in enacting § 630 and the precise scope of the constitutional dispute given the present posture of the case.

a. *Congress' Purposes*

Section 630, which was adopted as part of an omnibus appropriations measure, is captioned, "Employee Disclosure Agreements," and states as follows:

> Sec. 630. No funds appropriated in this or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:
>
> (1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or unclassified but known by the employee to be in the process of a classification determination;
>
> (2) contains the term "classifiable";
>
> (3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;
>
> (4) interferes with the right of the Congress to obtain executive branch information in a secure

> manner as provided by the rules and procedures of the Congress;
>
> (5) imposes any obligations or invokes any remedies inconsistent with statutory law; *Provided*, That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)-(5) of this section. [101 Stat. 1329; emphasis in original.]

This provision was Congress' response to the Executive's recently-imposed requirements that persons with access to any classified information sign an agreement not to disclose classified or "classifiable" information, and that persons with access to information that involves, or is derived from, intelligence sources or methods sign nondisclosure agreements that additionally require prepublication review and prior written authorization for any disclosure relating to such intelligence information, sources, or methods. In the few years following the Executive's establishment of these nondisclosure agreement policies, close to three million current and former federal employees have been required to sign these forms.[7] These executive policies raised two basic concerns that Congress sought to allay in § 630.

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[7] Standard Form 189 was issued in September 1983 as a requirement for federal employees with access to classified information. By December 1987, approximately 2.5 million current and former employees had been required to sign this form. Form 4193 was issued in 1981 as a requirement for federal employees with access to information that relates to or is derived from intelligence sources or methods. By December 1987, approximately 453,000 current and former employees, excluding CIA employees, had been required to sign this form or closely related forms. *Congress and the Administration's Secrecy Pledges: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong. 2d Sess. 169-171 (August 10, 1988) (hereinafter "1988 Hearing") (statement of L. Rodrigues, Assoc. Dir., National Security and International Affairs Div., General Accounting Office).

First, Congress was concerned that use in the agreements of the term "classifiable," because of the vague and indeterminate nature of the term, would chill the free flow of *non-classified* information about the workings of our government. Congress believed that the free-flow of such information from those with the most intimate knowledge of the day-to-day functioning of the government is an important check on government abuses and furthers the goal of efficient and productive government.[8] Congress was particularly concerned that the chill on disclosures emanating from use of the term "classifiable" in these agreements would undermine the effectiveness of the whistle blower protections enacted as part of the Civil Service Reform Act of 1978. *See* 5 U.S.C. § 2302(b)(8) (prohibiting any reprisals by federal employers for an employee's disclosures of law or rule violations, instances of mismanagement or waste, or of other federal abuses of authority).[9]

Subsections (1) and (2) of § 630 are designed to deal with this concern, by limiting the nondisclosure agreements to classified information and to information in the process of classification.

Second, Congress was concerned that the prior authorization requirement might be used to deny individual lower-level government employees direct access to Congress. Over the years, Congress has concluded that effective legislative oversight of the vast federal bureaucracy, particularly the defense bureaucracy, cannot be

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[8] *See, e.g.*, H. Conf. Rep. No. 100-498, 100th Cong. 1st Sess. 1179 (December 22, 1987) (hereinafter "1987 Conference Report"); *Classified Information Nondisclosure Agreements: Hearing before the House Subcomm. on Human Resources of the Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 8 (October 15, 1987) (hereinafter "1987 Hearing") (statement of Sen. Grassley); *id.* at 26 (statement of Rep. Brooks); 1988 Hearing, *supra* at 4 (statement of Sen. Proxmire).

[9] *See, e.g.*, 133 Cong. Rec. H 11999 (Daily ed. December 21, 1987) (Rep. Brooks); 1987 Hearing, *supra* at 8 (statement of Sen. Grassley); *id.* at 14-15 (statement of Rep. Boxer).

wholly reliant on information provided in the institutionalized responses of the executive departments. Congress has recognized the natural tendency for any administration to disclose information to Congress in a selective and self-serving manner, as well as more calculated efforts by executive officers to suppress evidence that would be embarrassing to the administration. Because Congress may not on its own initiative and information know what to investigate or whom to subpoena, the Legislature has become increasingly dependent on disclosures volunteered directly by lower-level government employees, who may have intimate knowledge of abuses occurring in government and a willingness to disclose them. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731, 733-734 (1982). Indeed, Congress—to facilitate such disclosures—has enacted a number of statutes that encourage and protect these employees' access to Congress.[10] In § 630, Congress acted out of concern that the Executive's employee disclosure policy, and particularly the prior authorization requirement, might serve as a deterrent, a censor, or at least a filter with respect to the transmittal of the information to Congress.[11]

Subsections (3) and (4) of § 630 are explicitly directed to this concern. Congress' method in these subsections is not to define or expand the categories of information that employees were already entitled to convey directly to Congress but to prohibit the use of the prior authorization requirement, or any similar impediment,

[10] *See, e.g.*, Military Whistleblower Protection Act, Pub. L. No. 100-456, § 846, 102 Stat. 2027 (September 29, 1988); 5 U.S.C. § 2302(b) (whistleblower protection provisions of Civil Service Reform Act of 1978); 5 U.S.C. § 7211 (Lloyd-LaFollete Act of 1912). See generall, *Bush v. Lucas*, 462 U.S. 367, 389 & n.37 (1983).

[11] *See, e.g.*, 1988 Hearing, *supra* at 5-6 (statement of Sen. Proxmire); *id.* at 14-15 (statement of Rep. Boxer); *id.* at 87-88 (statement of Rep. Fascell); 1987 Hearing, *supra* at 8-9 (statement of Sen. Grassley); *id.* at 14-15 (statement of Rep. Boxer); *id.* at 26 (statement of Rep. Brooks).

as a means of obstructing the pre-existing statutory and constitutional "right[s]" of individuals to communicate with members of Congress and of Congress to obtain information directly from such individuals.

b. *The Scope of the Constitutional Dispute*

In the present posture of the case, the Executive is no longer resisting § 630's elimination of the term "classifiable" from the nondisclosure forms. Indeed, the Executive has removed the term "classifiable" from the forms. In their current form these agreements refer only to classified information or information that meets the standards for classification and is in the process of a classification determination. *See* Motion to Affirm at 9, 12-13 & 18-19; *see also* 53 Fed. Reg. 38279; 32 CFR § 2003.20(h)(1)(i).

Moreover, the Executive has issued regulations directing that the term "classifiable" in outstanding previously executed agreements be interpreted as referring only to "[u]nmarked *classified* information, including oral communications; and . . . *unclassified* information that meets the standards for classification and is in the process of a classification determination." Motion to Affirm at 6-7 (quoting 32 C.F.R. 2003.20(h)(1)(i) (emphasis in original)).

The Executive has, in addition, given persons who signed the old forms the option of nullifying the prior agreement and substituting a signed agreement on the new form. 32 C.F.R. § 7003.20(b).[12]

Thus, the agreement forms presently in use by the Executive and the administrative interpretation of the old forms are in conformity with subsection (2) of § 630

[12] Appellants claim that the Executive has not given those who signed the old form agreements sufficient notice of the present interpretation of "classifiable" or of the option of substituting the new form agreement. The constitutionality of § 630 does not weigh in the balance of that dispute; rather, the dispute goes to the question of the Executive's compliance with § 630.

and, to a large measure, in conformity with subsection (1).

The Executive, however, apparently continues to resist the requirement in subsection (1) that as respects unmarked information the nondisclosure form may only apply to information "*known* by the employee to be in the process of a classification determination" (emphasis added). The Executive has issued regulations stating that the forms will be interpreted to hold the employee responsible if the employee either knows or reasonably should know that the information is classified or is in the process of a classification determination. 32 CFR § 2003.20(h)(1)(i).

Assuming that subsection (1) of § 630 permits only a *subjective* knowledge requirement in the form agreements, the present dispute as to the validity of the first two subsections of § 630 reduces to whether Congress may limit the Executive's ability to protect the confidentiality of classified information through an *objective* "should have known" standard.

The dispute concerning subsections (3) and (4) concerns a question of *procedure*. These subsections do not create any new substantive rights of communication between individual government employees and Congress. Rather, § 630 provides in this regard that where such rights exist the Executive may not obstruct the individual—by a prior authorization requirement or other impediment—from communicating directly with Congress.

The issue with respect to these subsections is thus whether § 630 is constitutionally invalid because the provision denies the Executive the right to advance approval of the communications in question.

2. The Powers of Congress

Enactment of § 630 is well within the powers expressly given to Congress by Article I of the Constitution.

Because § 630 is drafted in the form of a prohibition on the use of appropriated funds, it is proper to begin with the appropriations power. Article I, § 9 of the Constitution, in unequivocal terms, confers exclusively upon Congress the power to appropriate federal funds: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

This power is sweeping. "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not . . . previously sanctioned [by Congress]." *Reeside v. Walker*, 52 U.S. 272, 290 (1850).

The Founders were well aware of the significance of the power thus given to Congress. The power of the purse had after all been the means by which the British House of Commons had, in the 150 years prior to our Constitution's adoption, achieved "continual triumph . . . over the other branches of [British] government." The Federalist No. 58 (J. Madison) (C. Rossiter, ed., 1961) at 359.[13] Indeed, Madison pointed to the British experience as illustrating the point that the appropriations power is the ultimate legislative check on the power of the executive:

> [T]he purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. [*Id.*]

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[13] For reviews of this history, see H. Hallan, *The Constitutional History of England* 533-534 (1873); T. Tasswell-Langmead, *English Constitutional History* 428-429 (11th ed., T. Plucknett, 1960); Note, *The War-Making Powers: The Intentions of the Framers in the Light of Parliamentary History*, 50 B.U.L. Rev. 5, 6-8 (1970); 1988 Hearing, *supra* at 149-152 (legal memo by Prof. M. J. Glennon).

Madison went on to state:

> This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure. [*Id.*]

Indeed, so potentially powerful is the appropriations weapon in the process of pull and haul between the branches that the Framers felt constrained to put two explicit limits on its use against the other branches. The fair lesson of the narrow constraints chosen, however, is that the Framers envisioned all but the most extreme uses of the power to be valid. Thus, in Article II, § 7, the Constitution provides that the compensation of the President may not be diminished during his term. Hamilton explained that:

> It is evident that without proper attention to this article, the separation of the executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. They might, . . . reduce him by famine . . . to surrender at discretion his judgment to their inclinations. [The Federalist No. 73 (A. Hamilton) (C. Rossiter, ed., 1961) at 441.]

A similar exception was made for members of the Judicial Branch in Article III, § 1.

But there are no further express limits on Congress' ability to diminish appropriations for use by the Executive branch. *Cf. Embry v. United States*, 100 U.S. 680, 685 (1879) ("Congress has full control of salaries, except those of the President and the Judges . . . . The amount fixed at any one time may be added to or taken from at will.").

This Court has not strayed from the Founder's conception of the appropriations power as a potent legisla-

tive limit on executive power. Thus, in *Knote v. United States*, 95 U.S. 149, 154 (1877), the Court stated:

> Moneys once in the Treasury can only be withdrawn by an appropriation by law. However, large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, *as there is to all his powers*, it cannot touch moneys in the Treasury of the United States, except expressly authorized by Act of Congress. [(Emphasis added).]

And, in *Cincinnati Soap Co. v. U.S.*, 301 U.S. 308, 321 (1937), the Court declared:

> The provision . . . was intended as a restriction upon the disbursing authority of the Executive department . . . . It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.

Section 630 is a classic exercise of the appropriations power. Congress determined that no funds from the Treasury should be spent on a program desired by the Executive and opposed by Congress. The power to make just such a determination is precisely what the appropriations clause gives to the Congress.[14]

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[14] This Court has never held a congressional refusal to appropriate funds for the use of the Executive to be an unconstitutional interference with executive power. Indeed, the only invalidation of any congressional refusal to appropriate was *United States v. Lovett*, 328 U.S. 303 (1945), where the Court found that, under the guise of passing an appropriations measure, Congress had violated an express limit on legislative power found in the Constitution. Congress had accused certain named federal employees of disloyalty, tried them before a subcommittee hearing, and then barred them—by name—from any further receipt of their salaries from the Treasury. The measure was declared unconstitutional on the narrowest of grounds, that it was a bill of attainder, explicitly prohibited by Article I, § 9—*viz.*, " 'a legislative act which inflicts punishment without a judicial trial,' " *id.* at 315 (quoting *Cummings v. Missouri*, 71 U.S. 277, 323 (1866))—and as such, fell within those " 'certain specified exceptions to the legislative authority.' " 328 U.S. at 314 (quoting The Federalist No. 78 (A. Hamilton)). Thus,

The appropriations power is authority enough for Congress to have enacted § 630. But it should be understood that § 630 could as well rest on other powers expressly granted to Congress in Article I of the Constitution.

The correlative to the Article I, § 9 Appropriations Clause is the affirmative spending power set out in Article I, § 8 which grants Congress the power to "provide for the common Defense and general Welfare." The spending power is instinct with the understanding that Congress has a proper interest in every facet of government requiring funds from the Treasury.

In fact, precisely that interest motivated Congress in enacting § 630. Congress was concerned that the inhibitions on the flow of information from lower-level employees with intimate knowledge of government spending programs—particularly in defense spending programs—would deprive Congress of information needed to make sensible decisions as to which programs to fund and at what levels. *See, e.g.*, 1987 Hearing, *supra* at 14 (statement of Rep. Boxer) (noting need of House Armed Services Committee for information from military and civilian field personnel in its investigations of production and quality problems, overpricing and waste in weapons programs); *see also* notes 8 & 11 *supra*.

Closely related is Congress' authority to create, define, structure and limit the powers, and duties of the departments and offices of the Executive Branch. This grant of power is found in the "necessary and proper" clause of Article I, § 8, which follows the specific enumeration of the vast areas of Congress' legislative powers and grants Congress the additional power

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nothing in *Lovett* comes near to suggesting that there is some implied executive power that overrides Congress' discretion to decline to fund executive programs with which Congress disagrees.

> To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any department or Officer thereof.

A leading commentator explained this congressional power to structure the government by noting that the Constitution provides directly for only the three institutions at the apex of the federal government—the Congress, the President, and the Supreme Court—and that

> [t]he remainder of government was left undefined, in the expectation that congressional judgments about appropriate structure would serve so long as they observed the two prescriptive judgments embodied in the Constitution: that the work of law-administration be under the supervision of a unitary, politically accountable chief executive; and that the structures chosen permit, even encourage, the continuation of rivalries and tensions among the three named heads of government, in order that no one body become irreversibly dominant and thus threaten to deprive the people themselves of their voice and control. [Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 667 (1984).]

Pursuant to Article I § 8 Congress has in fact created, defined and structured the departments and offices of the Executive Branch, including those executive departments and offices concerned with foreign affairs and national security. And, of particular pertinence here, Congress has often chosen to create structures that leave the President with less than complete control over the officers, employees, and resources of the Executive branch. Congress has done so in order to further one or another theory of sound governance in a ceaseless experiment to determine which of the enumerable possible approaches proves out in fact. *See, e.g., Morrison v. Olson*, —— U.S. ——, 108 S.Ct. 2597 (1988); *Humphrey's Executor v.*

United States, 295 U.S. 602 (1935); *United States v. Perkins*, 116 U.S. 483 (1886); *Kendall v. United States*, 37 U.S. 524, 610 (1838).

As we have seen, subsections (3) and (4) of § 630 reflect a congressional determination to structure the flow of information from the executive departments so that Congress would have direct access to communications from lower-level government employees and not be wholly dependent upon the institutional communications from the departments. It is well within Congress' authority to structure executive departments in this way so that the departments will be amenable to effective legislative oversight. As the Court stated in *Bush v. Lucas*, *supra*, 462 at 389:

> Congress has a special interest in informing itself about the efficiency and morale of the Executive Branch. In the past it has demonstrated its awareness that lower-level Government employees are a valuable source of information, and that supervisors might improperly attempt to curtail their subordinates' freedom of expression. [(Footnote omitted)].

In addition to the general powers just discussed, Article I, § 8 contains numerous specific powers relating to foreign and national security affairs. Most prominent among these are the powers to "Provide for the common Defence," "regulate Commerce with foreign Nations," "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," "raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval Forces." Given these numerous and broad powers, "there is surely no warrant for confident assertion that there is any matter relating to foreign affairs that is not subject to legislation by Con-

gress." L. Henkin, *Foreign Affairs and the Constitution* 76 (1972).[15]

These expressly delegated powers, in turn, provide additional reasons for Congress to be interested in and concerned about the substance of the information § 630 is intended to cover. Congress' legitimate interest in information extends to all subjects where "legislation could be had," *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 506 (1975). The powers, for example, to "declare War" and to "raise and support Armies" are among the most serious foreign relations and national securities matters on which a government can act. Article I, in terms shows that Congress is entitled to obtain for itself the information necessary for the Legislature to carry out its constitutional responsibilities in these regards in an informed manner.[16]

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[15] On the broad scope of Congress' foreign relations and national security policy powers, see generally L. Henkin, *supra* at 67-88. Not mentioned in text but, of course, also a major area of congressional foreign policy inteerst and authority is the Senate's responsibility to advise and consent on treaties. Art. II, § 2.

[16] The assertion that § 630 is an invalid interference by Congress with some "exclusive" executive authority over national security information is particularly puzzling given the Constitution's explicit grant to Congress of the power to "make Rules for the Government and Regulation of the land and naval forces." Article I, § 8. The employee disclosure agreements governed by § 630 cover military, as well as civilian employees, *see* 1987 Hearing, *supra* at 62 (statement of S. Garfinkel), and accordingly Congress' authority to make rules governing the former group—such as those in § 630—is unambiguously provided in the constitutional text. Moreover, given that the text so clearly grants to Congress the authority to regulate the governance of military personnel—a group that must, by its nature, include many of those most intimately involved with sensitive national security information—the assertion that Congress must, as a general matter, be deemed constitutionally unqualified to enact rules relating to others exposed to national security information is implausible.

Finally, as this case illustrates, there is a judgement that our society must make as to how to balance the unquestioned need for secrecy in certain foreign relations and national security matters with the need for the public and the legislature to be informed sufficiently so that the democratic process may function. The Constitution does not make that judgment in terms nor does it provide a source of law or a detailed blueprint of government from which the judiciary may do so. For this is a judgment as to how best to "provide for the . . . general Welfare," and the office of Article I, § 8 is to enable Congress to pass legislation making such judgments (subject of course to the President's veto power). Section 630 is precisely the kind of law making Article I § 8 contemplates. Out of the myriad of possibilities—each with its merits and defects—Congress has determined to leave undisturbed the President's ability to classify information, and has merely sought to facilitate the flow of nonclassified information to the public and to remove impediments to communications with Congress that lower-level employees were already entitled to make pursuant to pre-existing laws. Making policy on this level through the enactment of public laws is a quintessential congressional role in the constitutional scheme.

3. The Powers of the President

Having thus established that Congress was acting pursuant to expressly delegated powers and within its constitutionally assigned sphere in enacting § 630, what is left to consider is whether some power of the President overrides the congressional authority to enact that provision. *See* pp. 3-6, *supra*.

The district court in this case ruled that: "The statute impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations." 688 F. Supp. 671, 685. That ruling appears

to be premised on the belief that "the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense." 688 F. Supp. at 684 (quoting *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J. concurring)). The district court asserted that as an incident of that exclusive power "congressional intrusion upon the President's oversight of national security information [is required to] be more severely limited than might be required in matters of purely domestic concern." 688 F. Supp. at 685. That court concluded that "[s]ection 630 cannot be construed as consistent with this principle or with the President's recognized authority." *Id.*

There is no precedent in this Court that provides a predicate for the district court's ruling. This Court has *never* struck down an act of Congress as unconstitutional on the ground that the act regulated in an area of foreign relations or national security exclusively within the domain of the President. *See* pp. 4-5, *supra*. And, in our view, this case provides no occasion for a decision of such profound implications. The district court's decision is wrong for two basic and far less controversial and momentous reasons.

First, the premise that this case involves matters of foreign relations and national security policy that are *exclusively* within the realm of the Executive does not bear analysis. Merely to invoke the phrases "foreign relations" or "national security" does not tell us whether or not matters within the scope of congressional authority are involved. As we have seen, Congress has considerable powers in the areas of foreign relations and national security policy. In these areas, as in any other enumerated area, the point of Article I is to grant to Congress the power to legislate with respect to particular subjects. By definition, as to subjects where the Con-

stitution provides that Congress has the power to act, the President's power is *not* exclusive.

Thus, for example, as to any matter involving an expenditure of funds from the Treasury, the President's power cannot be exclusive. The President is Commander in Chief, but if Congress does not appropriate the funds, the President will have no army to command. Moreover, the size and composition of the army of the United States, the rules by which the army is governed and regulated, and the weapons at its disposal, are by the express terms of the Constitution for Congress to determine. And, of course, the ultimate question of war or peace also rests with Congress. How then can it be correct to say that such critical national security matters as the nature and extent of our armed forces and its weapons are the exclusive concern of the Executive? The answer is that the statement is plainly incorrect.

As a corollary, intelligence relating to weapons systems and to the military strengths and weaknesses of foreign nations is relevant to Congress' constitutionally assigned tasks, as surely as this intelligence is relevant to the tasks given to the President. For such intelligence informs the determination of what kind of army to field, and what kinds of weapons to fund.

Indeed, the intelligence gathering capacity of this nation is itself a concern of Congress. The President would have little of the sensitive intelligence the Executive is at such pains to protect if Congress did not appropriate funds for the agencies and mechanisms that gather that intelligence. In exercising its power to determine funding of the intelligence agencies, as with any other agency of the federal government, Congress has a legitimate need to know what those agencies are doing and what those agencies are producing.

The question, then, whether the matters at issue in this case are within the exclusive domain of the President is

answered simply by asking whether the Constitution expressly delegates to Congress the authority to deal with those matters. As we have already shown, *supra* at 12-20, Congress has ample constitutional authority to deal with the matters addressed in § 630. That authority necessarily negates any assertion that we are in a zone that is exclusively the President's.

This conclusion is reinforced by the fact that, on the Executive's side, the claim of authority to engage in the formulation of foreign relations and national security policy is one *by implication* rather than, as in Congress' case, a claim *by express* grant. Article II expressly confers upon the President the executive functions of the government, including specifically the authority to make treaties—with the advice and consent of the Senate—and to serve as Commander in Chief. In our system, however, executive functions do not necessarily include the sole or the paramount responsibility for the formulation of broad policy objectives, but normally only include the responsibility to implement policies determined by the Legislature.

With regard to purely domestic issues, the broad policies of the United States are arrived at through legislative enactments, not through unilateral determinations of the Executive. To be sure, in the areas of foreign relations and national security, we have implied a broader role for the Executive in the determination of the Nation's policies. See p. 4, *supra*. But the very fact that this role is is derived by implication from grants of authority, stated in general terms weighs heavily against too readily accepting assertions of presidential power that would preclude the exercise by Congress of powers expressly given to the Legislature. *See* The Federalist No. 41 (J. Madison) (C. Rossiter, ed. 1961) at 263 (condemning methods of constitutional interpretation under which "the more doubtful and indefinite terms [are] retained in their full extent, and the clear and precise expressions [are] denied any signification whatsoever").

This is not to say that in the area of foreign relations and national security the legitimate authorities of the President and Congress are congruent. There may well be parts of the foreign relations power that are the President's exclusively. For example, as part of the executive function, the President, and not Congress, is authorized to speak for this country in the discourse that takes place among nations. And, the Constitution specifically grants to the President the sole power to "make treaties," subject only to the later advice and consent by the Senate. It is surely arguable from that sequential plan that Congress lacks the power in the first instance to require the President to make, or not to make, a treaty. And, it may be that under certain circumstances the Constitution should be understood as providing the President exclusive control during the treaty negotiation process of confidential diplomatic communications that may come to him as part of that process and that may require continued secrecy in order successfully to complete the negotiations. *Cf.* The Federalist No. 64 (J. Jay).

But the question whether there are *some* areas of exclusive presidential control in foreign relations is a distinct question from whether the *particular* subject covered by § 630 is under exclusive presidential control. Since for the reasons already given, the answer to the second and narrow question is clearly "no," it would be improper to go so far afield to speculate on hypotheticals.

Second, even under the district court's sweeping conception of the presidential power involved here, it is difficult to understand how § 630 could be thought to "restrict the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations." 688 F. Supp. at 685.

In *Nixon v. Administrator of General Services*, *supra*, 433 U.S. at 443 (1977), this Court stated the test that

must be met in order to strike down a statute on the grounds that Congress has prevented the Executive from carrying out its constitutionally assigned functions:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions . . . . Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. [*See also, Morrison v. Olson, supra*, 108 S.Ct. at 2621.]

With respect to § 630, the first prong of this test cannot be met: § 630 does not in any realistic regard "prevent" the Executive from performing its constitutional responsibilities.

Section 630, we emphasize, does *not* diminish in any respect the Executive's ability to classify information that the Executive believes must be kept secret. Nor does § 630 create—or even purport to create—any new right or enlarge any existing right to disclose classified information or information in the process of a classification determination.

Section 630 *does* remove the chilling effect on the dissemination of *non*-classified information that resulted from the Executive's use of the term "classifiable" in the old nondisclosure forms. The Executive has already elimiated the term "classifiable" from the forms and by so doing has implicitly acknowledged that use of that term is not essential to the Executive's ability to provide for the national security. And, as to the remaining dispute concerning the proper knowledge test for unmarked material, the different consequences, in practical terms, between an "objective" and a "subjective" standard are not nearly sufficient to represent a real threat to the Executive's ability either to provide for the national security or to keep classified information confidential. (Indeed, it

is far from clear that § 630 is intended to preclude the Executive from taking disciplinary action against an employee who unknowingly but carelessly discloses unmarked information in the process of a classification determination.) And, in any event, § 630 in no way restricts the Executive from marking any such written material with a stamp stating that the material is in the process of a classification determination or taking such other steps as the Executive may deem appropriate to assure that employees know of the classification status of the information the employees are given.

Similarly, § 630 *does* remove procedural obstructions to communications to Congress by individual government employees. The communications affected by this part of § 630 are *only* those communications that individuals already have a right to make by virtue of pre-existing laws. The extent to which such preexisting laws authorize individual employees to disclose classified information to Congress may be unclear. *See* note 10 *supra* (citing statutes). But if the Executive's problem is with the scope of the communications authorized by other laws, the answer is directly to challenge those other laws, not to challenge § 630, which itself creates no right to communicate any information but only facilitates the exercise of such rights.[17] Given the provision's very limited function there is simply no basis for believing that § 630 prevents the Executive from performing its constitutionally assigned function.

Under the *Nixon v. GSA* standard, then, § 630's *de minimis* effects on the handling and disclosure of government information hardly raise the kind of threat to the proper functioning of the Executive necessary to strike

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[17] Of course, any such challenge to these other laws would have to meet the burden of specifying the classes of information that the Executive contends are immune from Congress' powers and of providing reasons why those specific classes of information must be—as a constitutional matter—under the exclusive control of the Executive.

down an act of Congress on separation of powers grounds.

4. A Note On The Interdependence Of The Legislative And Executive Branches

By constitutional design, whether in foreign or domestic affairs, the President and Congress are largely dependent upon each other if the government—and the Nation—are to accomplish anything of substance. Congress can make laws but needs the President to execute them. Congress can appropriate funds but needs the President to spend those moneys. The President, in turn, may be stymied if Congress refuses to appropriate funds that he requests or to pass the legislation he needs. As Justice Jackson noted, "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*, 343 U.S. at 635 (Jackson, J., concurring).

Each branch ultimately must employ its *political* powers to influence the other branch to take particular courses of action. That is the nature of the "actual art of governing under our Constitution," *id.*, which "does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context," *id.*

Within our broad constitutional structure, the President must provide Congress sufficient reason, through information, negotiation, argument, or political pressure to convince Congress to make an appropriation, to pass legislation, or to ratify an appointment or a treaty. The political prosess will determine how much and what kinds of inducements must be provided.

In turn, Congress, equally responsible for the nation's welfare, must place its reliance on the President in order to attain its legislative goals. Congress, moreover, will be held politically responsible for its failure to provide

the President with sufficient resources and support to satisfy the nation's needs.

In this regard, as in all others, the two political branches of government have both legal (*i.e.*, express constitutional) and practical, structural strengths and weaknesses. *See, e.g.*, Black, *The Working Balance of the American Political Departments*, 1 Hast. Constit. L. Q. 13, 16-18 (1974). Two hundred years of experience demonstrates that the two protagonists are sufficiently well-matched that, at least so long as Congress acts as a legislature and within the prescribed forms, their contest produces the mix that the Founders envisioned of government action that comes from the fusion of Legislative and Executive powers and of individual liberty that comes from the diffusion of government power.

All this being so, since Congress did no more than exercise the legislative powers expressly granted by the Constitution, there is no occasion here for judicial alteration of the result that the Legislature mandated.

CONCLUSION

For the foregoing reasons, the decision of the district court in this case should be reversed.

Respectfully submitted,

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STEVEN GARFINKEL, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE THE GOVERNMENT ACCOUNTABILITY PROJECT AND THE FUND FOR CONSTITUTIONAL GOVERNMENT IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. WHISTLEBLOWERS ARE ESSENTIAL TO THE FORMATION OF PUBLIC POLICY 6

II. THE DECISION BELOW CASTS A CONSTITUTIONAL CLOUD OVER THE BODY OF STATUTORY LAW PROTECTING FREEDOM TO DISCLOSE MISMANAGEMENT AND MALFEASANCE 10

III. AN UNFORSEEN CONSEQUENCE OF THE DECISION BELOW MAY REINSTATE JURISDICTION OVER CONSTITUTIONAL TORT SUITS 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases: Page

American Foreign Service Association v. Garfinkel,
688 F. Supp. 671 (D.D.C. 1988) 11

Bivens v. Six Unknown Narcotics Agents,
403 U.S. 388 (1971) 14

Brown & Root v. Donovan,
747 F.2d 1029 (5th Cir. 1984) 2

Bush v. Lucas,
462 U.S. 388 (1983) 6, 9, 14, 15

Butz v. Economou,
438 U.S. 478 (1978) 14

Carlson v. Green,
446 U.S. 14 (1980) 14, 15

Davis v. Passman,
442 U.S. 228 (1979) 14

Frazier v. M.S.P.B.,
672 F.2d 150 (D.C. Cir. 1982) 2

Givhan v. Western Line Consolidated School District,
439 U.S. 410 (1979) 2, 3

Harlow v. Fitzgerald,
457 U.S. 731 (1982) 2

Kansas Gas & Electric v. Brock,
780 F.2d 1505 (10th Cir. 1985) 2

Martin v. Lauer,
686 F.2d 24 (D.C. Cir. 1982) 2

Page

National Federation of Federal Employees v. U.S./ American Federation of Government Employees et al. v. Garfinkel et al.,
No. 88-5402, 5404 (D.C. Cir. 1988) 2-3

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457 U.S. 731 (1982) 2

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859 F.2d 223 (D.C. Cir. 1988) 2

Statutes:

5 U.S.C. Section 2301, 2302 and 7701 2

5 U.S.C. Section 2302(b)(8) 7, 11

5 U.S.C. Section 7211 ..... 3, 8, 11

18 U.S.C. Section 1031(g) 11

29 U.S.C. Section 660(c) 12

29 U.S.C. Section 1293 12

31 U.S.C. Section 3730 11

33 U.S.C. Section 1367 12

42 U.S.C. Section 300-j-9 12

42 U.S.C. Section 5851 11

42 U.S.C. Section 6971 12

42 U.S.C. Section 7622 11

42 U.S.C. Section 9610 12

46 U.S.C. Section 1506 12

Page

49 U.S.C. Section 2305 12

P.L. No. 95-454, 92 Stat. 111 (1978) ..... *passim*

P.L. No. 100-202, 101 Stat. 1329
Section 630 (1987) ..... *passim*

P.L. No. 100-456, Section 846 (1988) 7

Legislative Materials:

133 Cong. Rec. H11999 (daily ed. Dec. 21, 1987) 10

134 Cong. Rec. S15336 (daily ed. Oct. 7, 1988) 7

134 Cong. Rec. H9322 (daily ed. Oct. 3, 1988) 9

134 Cong. Rec. H10637 (daily ed. Oct. 20, 1988) 7

S.508, 100th Cong. 2d sess. (1988) 2

Executive Order #1142 (Nov. 26, 1909)
Reprinted in 48 Cong. Rec. 5223 (1912) 8

Civil Service Reform Act, Report of House Comm. on
Post Office and Civil Service,
HR Rep. No. 95-1403 (1978) 9

Civil Service Reform Act, Report of Senate Comm. on
Govt. Affairs, SR Rep. No. 95-969 (1978) 9, 13

Classified Information Nondisclosure Agreements: Hearings
Before the Subcomm. on Human Resources of the House
Comm. on Post Office and Civil Service, 100th Cong.
1st sess. (1987) 8

Page

Legislation Needed to Curb Secrecy Agreements: Report by the House Comm. on Govt. Operations, 100th Cong. 2d sess. (1988) 13

Memorandum to Hon. Charles Grassley from the American Law Div., Cong. Research Service, Library of Cong. (July 28, 1987) 12

The Whitleblowers: A Report on Federal Employees Who Disclose Acts of Government Waste, Abuse, and Corruption, prepared for the Senate Comm. on Govt. Affairs, 95th Cong. 2d sess. (1978) 8

Other Authorities:

Devine and Aplin, Abuse of Authority: The Office of the Special Counsel and Whistleblower Protection, 4 Antioch Law Journal 5 (Summer 1986) 2

Devine and Aplin, Whistleblower Protection — The Gap Between the Law and Reality, 31 Howard Law Journal 2 (1988) 2

Federalist, ed. Jacob E. Cooke (1961) 4

Levy, *Original Intent and the Framers' Constitution* (1988) 5

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INTEREST OF AMICI

The Government Accountability Project (GAP) is a non-profit, non-partisan, public interest group formed in 1975 to help restore and maintain confidence in the federal system by making public officials accountable for their activities. In pursuit of these goals, GAP works to broaden public understanding of the role of the federal employee in preventing government waste, fraud, and abuse of authority.

GAP is especially concerned with civil servants who suffer retaliation for having spoken out about government wrongdoing. Through public education, legislative efforts and selective legal action, GAP strives to protect the First Amendment right of all federal employees to offer reasonable criticism without fear of retribution.

To further these goals GAP offers assistance to the courts in cases concerning the remedies available to federal employees under the Constitution, laws and treaties of the United States. GAP has filed several Amicus Curiae briefs before this and other federal courts. *See, e.g., Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979); *Nixon v. Fitzgerald,* 457 U.S. 731 (1982); *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Spagnola v. Mathis,* 859 F.2d 223 (D.C. Cir. 1988); *Frazier v. M.S.P.B.,* 672 F.2d 150 (D.C. Cir. 1982); *Martin v. Lauer,* 686 F.2d 24 (D.C. Cir. 1982); *Brown & Root v. Donovan,* 747 F.2d 1029 (5th Cir. 1984); *Kansas Gas and Electric Company v. Brock,* 780 F.2d 1505 (10th cir. 1985).

GAP has particularly concentrated on monitoring the implementation of the "whistleblower" protections of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. Sections 2301, 2302 and 7701. *See e.g.,* Devine and Aplin, *Abuse of Authority: The Office of the Special Counsel and Whistleblower Protection,* 4 Antioch Law Journal 5 (Summer 1986); Devine and Aplin, *Whistleblower Protection — The Gap between the Law and Reality,* 31 Howard Law Journal 2 (1988). Since 1980 GAP has testified regularly in annual congressional oversight hearings on implementation of "whistleblower" protections in the CSRA and advocated stronger protections for federal employees through the Whistleblower Protection Act of 1988, S. 508, 100th Cong. 2d Sess.

GAP continues to represent clients in the former companion cases to this action, *National Federation of Federal Employees*

v. U.S. and *American Federation of Government Employees, et al. v. Steven Garfinkel*, currently on appeal at the D.C. Circuit Court of Appeals (Nos. 88-5402, 88-5404).

The Fund for Constitutional Government (FCG) is a nonprofit public charity dedicated to fostering constitutional responsibility in the conduct of elected and appointed officials.

Representatives of FCG testified before Congress on the Civil Service Reform Act before its adoption. FCG has also testified at congressional oversight hearings on implementation of the CSRA. FCG and GAP joined in an a *amicus curiae* brief to this court in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

Amici's efforts on behalf of federal "whistleblowers" are made in furtherance of the belief that professional and dedicated civil servants who are free to exercise their First Amendment rights are essential to an effective and responsible democracy.

SUMMARY OF ARGUMENT

Recent breakdowns in government accountability have intensified the longstanding congressional commitment to challenge secret government through strengthened protection for whistleblowers — those employees who disclose government illegality or other significant misconduct. In theory and in fact, their disclosures have proven to be the unique, invaluable lifeblood for effective congressional oversight of Executive Branch activity. Congress has recognized the necessity of maintaining a free flow of information from whistleblowers since its 1912 passage of the Lloyd-Lafollette Act, 5 U.S.C. Section 7211, outlawing a "gag rule" strikingly similar to the nondisclosure agreements for which Section 630 cut off funding. There has been a consistent, bipartisan reaffirmation of the

Lloyd-Lafollette Act anti-gag principles, highlighted by whistleblower protections in the Civil Service Reform Act of 1978 and the Whistleblower Protection Act of 1988. The legislative history of the latter bill echoed the appropriations restrictions in Section 630 against nondisclosure agreements.

The District Court's decision purports to reject the constitutionality of a law claimed to create unprecedented restrictions on the President's duty to protect sensitive information. That premise is inaccurate. Section 630 merely incorporates the provisions of fundamental parent statutes representing the law of free communication established by Congress over the last 75 years, including the Civil Service Reform Act of 1978. By invalidating Section 630, the District Court inadvertently reversed this Court's doctrine of deferring to Congress as the proper branch to establish the remedies for national security violations.

The District Court's claim for the Executive of a plenary authority and responsibility to protect sensitive government information reveals a serious misunderstanding of the doctrine of separation of powers. History teaches that the original intent of the Framers was that the doctrine of separation contemplated a system of separate branches with shared, not mutually exclusive, powers. *Federalist*, ed. Jacob E. Cooke (1961), Nos. 47-48, especially at p. 332. As Professor Levy has noted:

> If much contemporary constitutional law is about rights, the reason is that as government gets larger, more complex, more powerful, and more intrusive, the need to stay Caesar's hand increases. If government exists to protect the individual, as the preamble of the Declaration of Independence suggests, and as the provisions of the Constitution suggest as strongly, then the Court must fortify our rights

> . . . The burden of proof should always be on the government to show that rights claimed must be denied lest legitimate ends go unfulfilled because no alternative means are possible and the needs of the government are compelling.

Original Intent and the Framers' Constitution, Levy (1988), p. 392. The District Court's application of a "minimal scrutiny" standard, 688 F. Supp. at 686-87, failed to include in the matrix of policy considerations the authority and responsibility Congress shares with the Executive for balancing the protection of the nation's secrets against the public's right to know and the individual's right to freedom of expression and communication. If the decision below is upheld, the well-developed body of statutory law protecting freedom of information will be jeopardized.

Significantly, prior to this litigation appellees had strenuously sought to reassure Congress that the Executive's non-disclosure agreements would not supersede the civil service laws that protect disclosures of mismanagement and malfeasance.

The decision below also casts a constitutional shadow over at least 12 other anti-fraud or environmental whistleblower protection statutes whose broad mandates do not recognize the District Court's limitation on the power of Congress to regulate the flow of information involving public health and safety.

In the absence of congressional authority to outlaw the use of nondisclosure agreements to foreclose the flow of such information the activity protected by these statutes will be effectively neutralized. In the case of the whistleblower provision of the Civil Service Reform Act, the nondisclosure agreements are tantamount to administrative repeal of the statutory boundary for protected conduct.

In all cases the statutes would be emasculated by the chilling effect of a pre-clearance requirement for almost any unmarked or unclassified information a conscientious employee seeks to disclose. The only way an employee can be certain of compliance with the Executive's nondisclosure agreements is to ask his or her boss whether the unmarked information is classified. That would automatically eliminate any prospect of making a confidential whistleblower disclosure and chill, if not freeze, the flow of information vital to informed congressional and public oversight of waste, fraud, abuse or mismanagement.

The prior review and authorization requirement would institutionalize an advance warning alert for targets of disclosures involving official wrongdoing. At a minimum, the targeted individual or agency could compromise the integrity of an investigation by actions such as occurred in the Iran-Contra case.

An unforseen consequence of the decision below may be reinstatement of jurisdiction over constitutional tort suits. That could occur if the *Bush v. Lucas*, 462 U.S. 388 (1983) doctrine of deference to statutorily-created administrative remedies for whistleblowers is preempted by the separation of powers doctrine. The vitality of the *Bush* doctrine depends upon effective alternate remedies for whistleblowers under the CSRA.

ARGUMENT

I. WHISTLEBLOWERS ARE ESSENTIAL TO THE FORMATION OF PUBLIC POLICY.

A primary lesson of the 1980's is the threat our nation faces from secret government. The tragedy of the Challenger disaster, the disillusionment of long-term, widespread Pentagon

procurement fraud and the lawlessness of the Iran-Contra scandal might all have been prevented if federal civil servants were confident they had the freedom to "commit the truth." The defense procurement scandal festered, as Senator Grassley observed, until it was exposed by a former federal employee. 134 Cong. Rec. S15336 (daily ed. Oct. 7, 1988). This year Congress demonstrated a major commitment to strengthen freedom to expose wrongdoing in the Executive Branch by unanimously passing the Whistleblower Protection Act of 1988, *id.* at S15328 (subsequently pocket-vetoed); the Major Fraud Act of 1988, 134 Cong. Rec. H10637 (daily ed. Oct. 20, 1988) and the Military Whistleblower Protection Act. Pub. L. No. 100-456, section 846, 100th Cong., 2d Sess. (1988).

The accelerating congressional mandate to improve protections for "whistleblowers" — defined under civil service law at 5 U.S.C. section 2302(b)(8) as those employees who disclose violatios of law, abuse of authority, mismanagement, gross waste or substantial and specific danger to public health or safety — is grounded in sound public policy. Government experts who are free to testify truthfully at public fora are essential tools of government accountabiliy.

In practice, whistleblowers have been the Achilles heel of secret government. When not muzzled, they have exposed quality control breakdowns in production of military equipment upon which our troops' lives depend; multi-billion dollar cost overruns for the C5-A transport and other military purchases such as the world's most expensive coffee pots, nuts, bolts, armrests and toilet seats; a life-threatening breakdown in federal inspection of meat sold to the public and the military; public health threats from unsafe nuclear power and weapons plants; national security threats from security breakdowns at nuclear weapons sites; and similar public policy debacles in-

volving information whose exposure would have been barred by nondisclosure agreements such as Standard Form (SF) 189. *See generally The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Government Waste, Abuse and Corruption Prepared for the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. (1978) ("Leahy Report"); *Classified Information Nondisclosure Agreements: Hearings before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. 1987 ("1987 Hearings").

Since passage of the Lloyd-Lafollette Act in 1912 Congress has recognized the indispensable necessity of maintaining a free flow of information from Executive Branch employees. 5 U.S.C. section 7211. That statute passed in response to a "gag rule" issued by President Taft, forbade federal employees from communicating with Congress, except through and with the consent of department heads. This restraint on expression was strikingly similar to SF 189. Executive Order #1142 of November 26, 1909, *reprinted in* 48 Cong. Rec. 5223 (1912).

Twenty seven years later Congress again emphasized its reliance on a free flow of information from the Executive to the Legislative branches when it enacted the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 STAT. 111 (codified as amended in scattered sections of 5 U.S.C.). The foundation for CSRA statutory whistleblower protections, the Leahy Report, explained:

> Federal employees are often the source of information about agency operations suppressed by their superiors. Since they are much closer to the actual working conditions than top agency officials, they have testified before Congress, spoken to reporters, and informed the public. Mid-level employees pro-

> vide much of the information Congress needs to evaluate programs, budgets, and overall agency performance.

Leahy Report, *supra*, at 40. *See also* HR Rep. No. 95-1403, at 386-87 (1978). As emphasized in the CSRA legislative history, "Protecting employees who disclose government illegality, waste and corruption is a major step toward a more effective civil service. In the vast federal bureaucracy, it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth." S. Rep. No. 95-969, at 8 (1978). In reviewing the CSRA legisltive history, this Court observed in *Bush v. Lucas*, "There is a remarkable similarity between comments made in Congress in 1912, when the Lloyd-Lafollette Act was passed, and in 1978 when the Civil Service Reform Act was enacted." 462 U.S. at n.37.

If there was any doubt about the congressional premise that nondisclosure agreements are incompatible with civil service law, it was dispelled in the Joint Explanatory Statement for the Whistleblower Protection Act of 1988:

> It is obvious, but worth noting, that no Executive order, regulation or contract can extinguish the rights provided under section 2302 of title 5. Employees have been required to sign security agreements as a condition for gaining access to classified information which seem to suggest that the signers of such agreements could be punished for disclosures protected by 5 U.S.C. 2302(b)(8). Insofar as these agreements seem to limit the ability of whistleblowers to exercise rights provided under Chapters 12 and 23 of title 5, the security agreements are not valid.

134 Cong. Rec. H9322 (daily ed. Oct. 3, 1988).

II. THE DECISION BELOW CASTS A CONSTITUTIONAL CLOUD OVER THE BODY OF STATUTORY LAW PROTECTING FREEDOM TO DISCLOSE MISMANAGEMENT AND MALFEASANCE.

The significance of this case goes far beyond the appropriations rider that section 630 represents. If the decision below is upheld and its holdings applied in other contexts, it may seriously undermine the Constitutional and statutory protections accorded federal employees' communications with Congress that have evolved over the last 75 years.

Congress clearly intended Section 630 as an interim measure against vague overinclusive nondisclosure agreements. As Representative Brooks explained on the House floor prior to its passage,

> Needless to say, the administration's use of these secrecy pledges, represents a sharp attack on free speech under the first amendment and the whistleblower protections of various civil service laws. It is imperative, therefore, that Congress review this policy and legislate adjustments to preserve a proper balance between national security considerations and free speech in our Republic.

133 Cong. Rec. H11999 (daily ed. Dec. 21, 1987).

Prior to this litigation, appellee Garfinkel did not dispute the supremacy of statutory protections in conflict with the nondisclosure agreements. To the contrary, in congressional testimony he attempted to reassure Congress that SF 189 did not supersede the CSRA whistleblower provision, 1987 Hearings, *supra*, at 81, a policy he subsequently formalized. 53 Fed. Reg. at 38,279 (32 C.F.R. section 2003.20 (g)).

Congress took appellee Garfinkel at his word by specifically implementing through Section 630 his generalized principles.

The District Court swept this delicate compromise aside. Ironically, the provisions which the District Court found most constitutionally objectionable are those drawn directly from the Lloyd-Lafollette Act and the CSRA whistleblower shield, 5 U.S.C. section 2302(b)(8). If upheld, the decision below may cast a chilling shadow over the constitutionality of numerous others.

The provisions that the district court found to be "[p]articularly offensive" are subsections (3) through (5) of section 630." 688 F. Supp. at *685*. Subsections (3) and (4), however, restate the statutory protection for communicating with Congess in place since 1912 under the Lloyd-Lafollette Act. 5 U.S.C. section 7211. Subsection 5 merely paraphrases the boundary for unrestricted disclosures under the CSRA whistleblower provision — protection of significant dissent unless the disclosure is specifically prohibited by statute or executive order.[1]

The decision below casts a shadow over other statutes whose broad protections do not recognize the District Court's mandate of absolute discretion for the Executive Branch to restrict the flow of sensitive information. To illustrate, the False Claims Reform Act of 1986 has a whistleblower protection clause for those who act "in furtherance of" investigations and litigation that seek to recover fraudulent payments. 31 U.S.C. section 3730. The Major Fraud Act of 1988 has a similar provision. 18 U.S.C. 1031 (g).[2]

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[1]The Military Whistleblower Protection Act, *supra*, adopts the same boundary for protected disclosures and reaffirms Congress' right to receive information even from service members.

[2]Similar uncertainty would pervade the status of ten environmental whistleblower provisions administered through the Department of Labor to protect those who assist in enforcing corresponding organic statutes. These endangered statutes include the Clean Air Act, 42 U.S.C. section 7622; Energy Reorganization Act, 42 U.S.C. section 5851; Occupational

SF 189 particularly impinges upon the narrower disclosure channel in the CSRA for classified information. Under the CSRA, an employee has an unqualified right to make disclosures of classified information to an agency Inspector General or the Office of the Special Counsel of the Merit Systems Protection Board. The nondisclosure agreements prohibited by Section 630 ignore this statutory channel for national security whistleblowers. Under SF 189 the employee first must submit the information for prior review and authorization, only after the employee's agency agrees the Inspector General or Special Counsel has a "need to know" may a confidential or classified disclosure be made. The same is true of proposed disclosures to Congress.

In evaluating the propriety of SF 189, the American Law Division of the Library of Congress put this issue in perspective.

> In a practical sense, to the extent that the secrecy agreement because of its apparent breadth and vagueness of terms chills or discourages the disclosure of any information which evidences waste, fraud, corruption or illegality in government, that effect or result would be in contrast to and in derogation of the intended result of the whistleblowing statute.

Memorandum to Honorable Charles Grassley from the American Law Division, Congressional Research Service, Library of Congress, at 7 (July 28, 1987).

Safety and Health Act, 29 U.S.C. section 660(c); Safe Containers for International Cargo Act, 46 U.S.C. section 1506; Safe Drinking Water Act, 42 U.S.C. section 300-j-9; Solid Waste Disposal Act, 42 U.S.C. section 6971; Superfund Act, 42 U.S.C. section 9610; Surface Mining Control and Reclamation Act, 29 U.S.C. section 1293; Surface Transportation Act, 49 U.S.C. section 2305; and Water Pollution Control Act, 33 U.S.C. section 1367.

That is precisely the impact the nondisclosure agreements will have if the decision below is upheld. The almost limitless scope of information that is classifiable, combined with the lack of any required notice of its status, means that virtually any information can be suppressed. *Legislation Needed to Curb Secrecy Agreements: Report by the House Comm. on Gov. Ops.*, 100th Cong., 2d Sess. 9-10 (1988) ("Secrecy Report").

The prior authorization requirement of the nondisclosure agreements precludes Congress' ability to protect confidential communications. The House Government Operations Committee explained,

> Without the classification markings on unclassified information, however, an employee cannot be sure that the nondisclosure agreements' restrictions apply to that material. Consequently, they must check with their superiors, alerting them to the disclosure. This invites a chilling effect. As Congresswoman Boxer noted at the [committee's prior] hearings , "I am concerned that this will force would-be whitleblowers to have to ask their superiors about classification determinations. This will stop them."

Id., at 10 n.35. As the legislative history of the CSRA noted, "Protection of the complainant's identity is essential not only to prevent retaliation against the employee, but to assure a free flow of information to the Special Counsel." S. Rep. 95-969, at 33 (1978).

Congress' inability to prohibit the prior authorization requirement means agencies will have a total veto power over disclosures. We recognize the need to discourage irresponsible leaks, but the deterrent adopted by the Executive exceeds the need for administrative control. Congress is best suited to draw this line. As Senator Grassley explained in the Secrecy Report, *supra* at 10 n.36, "If the employee is not certain if

information might some day be classified, he or she must ask a supervisor. As a result, the potential whistleblower would be identified, and the supervisor could block disclosure of the information, even if it was not classified and had never been intended to be classified, but was simply embarrassing to the Administration."

The net effect of invalidating Section 630 is to strip Congess of the ability to defend its statutory free speech protections.

III. AN UNFORSEEN CONSEQUENCE OF THE DECISION BELOW MAY REINSTATE JURISDICTION FOR CONSTITUTIONAL TORT SUITS.

An unforseen consequence of upholding the decision below may be to reinstate jurisdiction over constitutional tort suits under *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).

If the protection afforded disclosures of information by the CSRA is jeoparized in whole or in part by affirmance of the District Court's rationale in this case — i.e., a wall of separation exists between the Executive and Congress over protection of the nation's secrets — then the carefully fashioned CSRA remedy for constitutional torts countenanced by this Court's decision in *Bush v. Lucas, supra*, may have to be revisited.

To accept the District Court's separation of powers articulation denigrates the doctrine and the Court's longstanding recognition that Congress is ultimately the appropriate body to create remedies, especially for federal civil servants. *Carlson v. Green*, 446 U.S. at 19-20; 27-28; *Davis v. Passman*, 442 U.S. 228, 242, 245, 246-47 (1979); *Butz v. Economou*, 432 U.S. 478, 504 (1978).

The premise of *Bush v. Lucas* is the supremacy of the legislative will in matters affecting remedies for prohibited personnel practies. If that premise is undermined by affirmance of the District Court's separation of powers justification, reinstatement of the Bivens remedy may be mandated by this Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980). Certainly, if the Constitution preempts the whistleblower's statutory (CSRA/MSPB) remedy for retaliatory personnel action, the courts would be hard pressed not to recognize the traditional judicial remedy.

CONCLUSION

If upheld, the decision below will open a Pandora's box of unacceptable consequences — creating a black hole that threatens to swallow the statutory protections and remedies afforded civil service whistleblowers. For these reasons, *amici* urge reversal of the District Court's decision.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN FOREIGN SERVICE ASSOCIATION, *et al.*,

Appellants,

—v.—

STEVEN GARFINKEL, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS	1
STATEMENT OF THE CASE	4
A. Section 630	6
B. District Court Proceedings	10
C. Proceedings after the District Court's May 27, 1988 Decision	15
D. Present Status of the Nondisclosure Agreements	17
SUMMARY OF ARGUMENT	20
ARGUMENT	23
I. THE DISTRICT COURT'S DECISION SHOULD BE VACATED BECAUSE THERE IS NO CASE OR CONTROVERSY BEFORE THIS COURT	23
A. The Dispute Concerning Use Of The Term "Classifiable" Is Now Moot	24
B. There Is No Ripe Dispute Concerning Any Violation Of Section 630'S Knowledge Requirement	28

Page

1. The potential issue of whether there is a conflict between section 630's knowledge requirement and the nondisclosure agreements was never before the district court 31

2. Any dispute that may exist concerning the knowledge requirement cannot be resolved on this empty record . . . 33

C. There Is No Ripe Dispute Concerning Any Violation Of The Provisions Of Section 630 Relating To Communications To Congress 41

II. IN THE ALTERNATIVE, THIS COURT SHOULD REVERSE THE DISTRICT COURT'S DECISION ON THE MERITS BECAUSE NATIONAL DEFENSE AND FOREIGN AFFAIRS POWERS ARE NOT EXCLUSIVE TO THE EXECUTIVE BRANCH 48

A. Congress And The President Share Constitutional Authority To Make Policy On The Uses Of National Security Information 49

Page

B. The President's Powers In National Defense And Foreign Affairs Do Not Bar Congress From Legislating To Protect Individual Constitutional Rights 53

C. The President's Powers In National Defense And Foreign Affairs Do Not Bar Congress From Legislating To Protect Its Own Constitutional Lawmaking Function 55

CONCLUSION 59

TABLE OF AUTHORITIES

Page

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Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) 37

Page

Katzenbach v. Morgan,
384 U.S. 641 (1966) 54

Marbury v. Madison,
5 U.S. 137 (1803) 54

McGrain v. Daugherty,
273 U.S. 135 (1927) 58

Meese v. Keene,
107 S.Ct. 1862 (1987) 32

Morrison v. Olson,
108 S.Ct. 2597 (1988) . . . 50, 52, 55, 58

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Employees v. United States,
695 F.Supp. 1196 (D.D.C. 1988),
appeal docketed, No. 88-5404
(D.C.Cir. Nov. 22, 1988) . . . . . passim

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Administration,
433 U.S. 425 (1977) 38, 52, 57

Pennzoil Co. v. Texaco, Inc.,
481 U.S. ___,
107 S.Ct. 1519 (1987) 39

Springfield v. Kibbe,
480 U.S. ___,
107 S.Ct. 1114 (1987) 33

United States v. Curtiss-
Wright Corp.,
299 U.S. 304 (1936) 51

Page

United States v. Munsingwear,
340 U.S. 36 (1950) 28, 40

United States v. Nixon,
418 U.S. 683 (1974) 38, 50, 52

Youngstown Sheet & Tube
Co. v. Sawyer,
343 U.S. 579 (1952) 22, 49, 50, 51

STATUTES AND REGULATIONS

5 U.S.C. §7211 42

28 U.S.C. §1252 15

50 U.S.C. §413 56

Civil Service Reform Act,
5 U.S.C. §2302 42

Continuing Resolution for Fiscal
Year 1988, Pub. L. No. 100-202,
§630, 101 Stat. 1329 (1987) . . . . passim

Dept. of Defense Appropria-
tions Act (Boland Amendment),
Pub. L. No. 98-473,
98 Stat. 1837 (1985) 57

Postal Service and General
Government Appropriations
Act of 1989, Pub. L. No. 100-440,
§619, 102 Stat. 1721 (1988) 4

Page

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102 Stat. 662 (1988) 15

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(Dec. 21, 1987) 34

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(Sept. 29, 1988) 17, 18

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(Sept. 29, 1988) 18, 19, 34, 42, 46

LEGISLATIVE HISTORY

133 Cong. Rec. H11,999
(daily ed. Dec. 21, 1987) 9, 42

Classified Information Nondisclosure Agreements: Hearings Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service,
100th Cong., 1st Sess.
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Page

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96th Cong., 2d Sess. (1980) 56

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INTEREST OF AMICUS[1/]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members that is dedicated to the protection of civil liberties and civil rights. The ACLU has a long history of promoting the First Amendment rights of all persons, including government employees, and protecting these rights from abridgement in the name of "national security". The ACLU also has a long history of protecting civil liberties through promoting openness in government.

Thus, the ACLU has frequently defended Congress' right to obtain information from the executive branch, especially information concerning national defense and for-

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1/ Letters of consent to the filing of this brief have been lodged separately with the Clerk pursuant to Supreme Court Rule 36.2.

eign affairs, so that Congress may exercise its constitutional responsibilities on the most complete record possible. In addition, the ACLU has often expressed its concerns about federal employee nondisclosure agreements applicable to national security information.

Of particular relevance here, the ACLU participated in congressional hearings prior to the passage of the specific legislation that was before the district court in this case, and was directly involved in the process which led to the statute's enactment. See Classified Information Nondisclosure Agreements: Hearings Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service, 100th Cong., 1st Sess. 143-144 (1987). It was understood at the time that the statute was a temporary stopgap measure

that addressed only one of many concerns of both Congress and the ACLU about the use of nondisclosure agreements: namely, the applicability of the agreements to so-called "classifiable" -- i.e., unclassified -- information.

For the reasons set forth below, the district court's decision holding the statute facially unconstitutional as a violation of separation of powers was clearly incorrect. However, developments subsequent to the district court's decision have resolved the controversy over "classifiable" information. Given the current state of the record, this Court should not review the merits of the district court's decision; that decision should simply be vacated as moot.

STATEMENT OF THE CASE

This is a direct appeal of a district court's decision striking down Section 630 of the Continuing Resolution for Fiscal Year 1988[2/] as facially unconstitutional. Section 630 prohibits the President from using federal employee nondisclosure agreements that purport to cover unclassified but "classifiable" national security information. The statute also preserves existing congressional rights of access to executive branch information.

The district court, without elaboration and with no reference to specific provisions of section 630 or to the prior

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2/ Pub. L. No. 100-202, §630, 101 Stat. 1329 (1987). In September 1988, section 630 was reenacted for Fiscal Year 1989 as section 619 of the Treasury, Postal Service and General Government Appropriations Act of 1989, Pub. L. No. 100-440, 102 Stat. 1721 (1988). This brief refers to both statutes collectively as section 630.

holdings of this Court, held that this congressional limitation on presidential control of national security information is unconstitutional because it interferes with what the district court regarded as the President's plenary authority over national defense and foreign affairs.

The district court's sweeping decision is fundamentally inconsistent with the constitutional scheme established by the framers, endorsed by this Court, and accepted by the political branches that routinely exercise joint authority over national defense and foreign affairs. Section 630 properly implements Congress' power to protect the First Amendment rights of executive branch employees and its own right to receive executive branch information. If this Court reaches the merits, it must reverse the district court's decision.

It is unnecessary, however, for this Court to reach those larger issues, and it should not do so. The controversy addressed by the district court's decision no longer exists. As detailed below, the claims pressed by plaintiffs in the district court related to use of the term "classifiable" in the challenged nondisclosure agreements. Those claims have become moot because of developments subsequent to the district court's opinion. No other issues relating to section 630 are ripe for decision because they are not presented by the factual record in this case.

A. Section 630

Section 630 was adopted by Congress on December 21, 1987. It was prompted by Congress' concern about the term "classifiable" that appeared in two nondisclosure

agreements adopted by the executive branch. Conf. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987). Standard Form ("SF") 189 applied to federal employees with access to classified information, and Form 4193 applied to employees with access to a specific category of classified information called "Sensitive Compartmented Information" ("SCI").[3] Both agreements prohibited the unauthorized disclosure of "classifiable" information as well as information that had, in fact, been classified.[4]

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[3] SCI is a category of classified information involving intelligence sources and methods that consists of "data about sophisticated technical systems for collecting intelligence and the information collected by those systems." DCI Security Committee, Sensitive Compartmented Information: Characteristics and Security Requirements 1 (June 1984), Exh. A to the Declaration of DCI Webster, attached as Exh. 4 to Defts' Mem. of Points and Auth. in Opp. to Mot. for Prelim. Injunction.

[4] SF 189 provided: "As used in this Agreement, classified information is information that is either classified or classifiable under the

(continued...)

This extension of nondisclosure agreements beyond the objective confines of classified information marked a dramatic change from past administrative practice and generated great concern in Congress and among federal employees faced with signing the agreements.

In order to prevent the First Amendment problems caused by a prohibition on disclosures of unclassified but "classifiable" information, Congress provided in section 630 that no funds could be spent "to implement or enforce" any nondisclosure agreement that "contains the term classi-

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4/ (...continued)
standards of Executive Order 12356 . . . ." Joint Appendix ("JA") at 15.

Form 4193 referred to Sensitive Compartmented Information (SCI) and stated that "SCI involves or derives from intelligence sources or methods and is classified or classifiable under the standards of Executive Order 12065 . . . ." JA at 19.

fiable," §630(2), or that applies to unclassified information other than information which is "in the process of a classification determination," §630(1). Congress also imposed a knowledge requirement on any nondisclosure agreement by limiting its reach to information that either is marked classified or is "known" by the employee to be classified or in the process of classification, §630(1). See Conf. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987). In addition, Congress preserved the status quo regarding the statutory rights of employees to disclose information to Members of Congress and the rights of Members of Congress to obtain executive branch information. See §630(3)-(5); 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987).

Section 630 of the Continuing Resolution was enacted for a one year period to give Congress time to study the matter and come up with permanent legislation.[5] It was then reenacted for a second year.[6]

B. District Court Proceedings

On February 19, 1988, the American Foreign Service Association ("AFSA") and seven Members of Congress[7] filed this action alleging that SF 189 and Form 4193

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[5] When enacting section 630, Congress expressed its intent "to examine the entire issue of non-disclosure agreements . . . and to make appropriate responses to executive branch policy in this area as needed." Conf. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987).

[6] See n.2, supra.

[7] Senator David Pryor, Senator Charles Grassley, Congressman Jack Brooks, Congresswoman Barbara Boxer, Congressman Gerry Sikorski, Congresswoman Patricia Schroeder, and Senator William Proxmire, who will retire from the Senate in January 1989.

violate section 630.[8] AFSA is a professional and labor association for employees of the State Department. Most of its members have access to classified information and many of them have access to SCI. In their complaint, plaintiffs sought declaratory and injunctive relief to bar defendants from requiring federal employees to sign the challenged nondisclosure agreements, which then contained the term "classifiable" but effectively no longer do so. Plaintiffs claimed that the nondisclosure agreements as they then existed violated section 630.[9]

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[8] The complaint named as as defendants: Director of Central Intelligence William Webster, Secretary of State George Shultz and Director of the Information Security Oversight Office Steven Garfinkel.

[9] Plaintiffs also sought a declaration that all agreements signed since enactment of section 630 were void.

On March 9, 1988, the district court consolidated this case with two previously filed actions challenging the agreements on constitutional grounds. National Federation of Federal Employees v. United States ("NFFE v. U.S."), No. 87-2284 (D.D.C. Aug. 17, 1987); American Federation of Government Employees v. Garfinkel ("AFGE v. Garfinkel"), No. 87-2412 (D.D.C. Sept. 1, 1987). Following consolidation, all of the plaintiffs moved for summary judgment on the ground that defendants were violating section 630 by continuing to require federal employees to sign SF 189 and Form 4193.10/ In addition, plaintiffs in NFFE v. U.S. and AFGE v. Garfinkel also claimed

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10/ Plaintiffs in the present case had previously filed a motion for preliminary injunction, which was then pending.

that the term "classifiable" was unconstitutionally overbroad and vague.

The government responded by moving to dismiss all three actions.[11] Among other things, the government argued that it had complied with section 630, that plaintiffs' claims were not ripe, and that in any event, section 630 violates the principle of separation of powers.

On May 27, 1988, the district court issued a memorandum opinion and order in the consolidated cases. 688 F.Supp. 671 (D.D.C. 1988). It denied plaintiffs' motions for summary judgment based on the claimed conflict between the nondisclosure agreements and section 630. "Assuming" but not deciding that defendants had failed to

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[11] The government's motion to dismiss was ultimately treated as a motion for summary judgment by the district court. 688 F.Supp. 671, 686 (D.D.C. 1988).

comply with section 630, id. at 683, the district court held the statute to be an unconstitutional violation of the principle of separation of powers:

> Wherever may be drawn the line between the political branches in the area of regulating access to national security information, section 630 surely falls within territory where it is not welcome. The statute impermissibly restricts the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations.

Id. at 685. Accordingly, the district court granted defendants' motion for summary judgment in the AFSA case because plaintiffs' claims rested solely on section 630.[12/] This direct appeal followed.[13/]

12/ The district court also granted defendants' motion for summary judgment on the grounds that the congressional plaintiffs have no standing to sue. 688 F.Supp. at 682. This brief does not address that question which, as plaintiffs note, the Court need not reach. See Brief of Appellants at n.6.

(continued...)

In the companion cases, NFFE v. U.S. and AFGE v. Garfinkel, plaintiffs' statutory claims were similarly dismissed. The district court did not, however, dispose of the additional claim raised by NFFE and AFGE that the nondisclosure agreements violated the First Amendment. Rather, it reserved this constitutional claim for future consideration. 688 F.Supp. at 675, 689.

C. Proceedings after the District Court's May 27, 1988 Decision

After the appeal in this case was filed, the parties in NFFE v. U.S. and AFGE v. Garfinkel continued to litigate the First Amendment question reserved by the

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13/ (...continued)
13/ Plaintiffs appealed directly to this Court pursuant to 28 U.S.C. §1252, which since that time has been repealed. Pub. L. No. 100-352, §1, 102 Stat. 662 (1988).

district court's May 27, 1988 decision. On July 29, 1988, the district court ruled that the reference to "classifiable" information in the nondisclosure agreements, without further definition or elaboration, was unconstitutionally vague and overbroad. 695 F.Supp. 1196 (D.D.C. 1988).[14/]

The government has chosen not to appeal that ruling. Instead, it has complied with the district court's order by deleting all use of the term "classifiable" from its nondisclosure agreements. Thus,

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14/ On a different constitutional issue, the district court agreed with the government's view that federal employees could be held responsible for disclosures of unmarked information if "they have reason to believe that unmarked information is classified or should be classified and is in the process of becoming so." 695 F.Supp. at 1203-04. Plaintiffs have appealed that ruling, as well as the ruling that section 630 violates separation of powers, to the Court of Appeals. AFGE v. Garfinkel, appeal docketed, No. 88-5402 (D.C.Cir. Nov. 17, 1988); NFFE v. United States, appeal docketed, No. 88-5404 (D.C.Cir. Nov. 22, 1988).

the government no longer requires employees to sign either SF 189 or Form 4193 and cannot enforce the term "classifiable" in any previously signed agreements.

D. Present Status of the Nondisclosure Agreements

No government employees, including the members of the plaintiff association in this case, are now required to sign nondisclosure agreements that cover "classifiable" information. Indeed, the nondisclosure agreements challenged by plaintiffs in this case, SF 189 and Form 4193, are no longer in use. In accordance with the district court's July ruling, the forms which have replaced them do not contain the term "classifiable." See 53 Fed. Reg. 38,278 (Sept. 29, 1988), amending 32 C.F.R. §2003.20; Standard Form 312 and Form 4355,

JA at 54-58, 66.[15] In contrast to their predecessors, the current agreements refer only to classified information or information that meets the standards for classification and is in the process of a classification determination. 53 Fed. Reg. 38,279 (Sept. 29, 1988), amending 32 C.F.R. §2003.20(h).

Moreover, employees who signed nondisclosure agreements containing the term "classifiable" have been informed, or are in the process of being informed, that the term has been stricken from the agreement and no longer has operative effect. See 695 F.Supp. at 1206; 53 Fed. Reg. 38,278

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[15] Defendants replaced SF 189 with Standard Form 312 in response to the district court's holding that the undefined use of the term "classifiable" is unconstitutional. See 53 Fed. Reg. 38,278 (Sept. 29, 1988), amending 32 C.F.R. §20003.20. Form 4355 was approved to replace Form 4193 on March 18, 1988. Declaration of Lt. Gen. Heinz, JA at 52.

(Sept. 29, 1988), amending 32 C.F.R. §2003.20; Appellees' Motion to Affirm at 13. Employees who signed the old agreements have, in addition, been given the right to sign a new agreement that does not refer to "classifiable" information. 53 Fed. Reg. 38,279 (Sept. 29, 1988), amending 32 C.F.R. §2003.20(b).

Current regulations also acknowledge that the nondisclosure agreements do not limit the rights of federal employees to communicate with Members of Congress. Specifically, the applicable regulations state that the terms of the nondisclosure agreements "do not supersede the provisions of section 2302, Title 5, United States Code, which pertain to the protected disclosure of information by Government employees, or any other laws of the United

States." 53 Fed. Reg. 38,279 (Sept. 29, 1988), amending 32 C.F.R. §2003.20(g).

Thus, plaintiffs' claims have been resolved in their favor and there is no remaining controversy about the provisions of section 630 relied upon by plaintiffs in seeking relief below.

SUMMARY OF ARGUMENT

The basis on which the district court entered judgment is far-reaching and unprecedented. Its view of the constitutional separation of powers issue is unsupported by the Constitution or other authority and threatens the sensitive and critical alliance that currently exists between the President and Congress on matters of national defense and foreign affairs. If it reaches the merits, this Court should,

consistent with its prior decisions, reverse the district court's judgment.

However, the Court need not reach the merits of the broad constitutional questions posed by the district court's opinion. The only case or controversy before the district court concerned the defendants' use of the term "classifiable" in nondisclosure agreements in violation of section 630. That dispute is now moot because the term "classifiable" has been removed from the nondisclosure agreements in compliance with the district court's constitutional ruling in related cases.

Although the district court's decision is not confined to those provisions of section 630 relating to the term "classifiable," there is no ripe dispute concerning any violation of any other requirement of section 630. Plaintiffs never claimed any

violation of section 630's knowledge requirement; nor is there an adequate factual record for considering either that requirement or section 630's protection of federal employees' communications with Congress. Thus, any consideration of section 630's constitutionality is premature.

Should the merits be reached, it is essential for this Court to issue an unequivocal statement that Congress is, and must remain, a co-equal partner in the formulation of national defense and foreign affairs policy. The contrary view adopted by the court below is inconsistent with the constitutional approach most forcefully articulated by this Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

Accordingly, the decision below must either be vacated or reversed.

ARGUMENT

I. THE DISTRICT COURT'S DECISION SHOULD BE VACATED BECAUSE THERE IS NO CASE OR CONTROVERSY BEFORE THIS COURT

In the district court, plaintiffs challenged defendants' continuing use of two nondisclosure forms. Specifically, plaintiffs claimed that SF 189 and Form 4193 violated section 630 by using the term "classifiable" and thus restricting the disclosure of unclassified information. Since this appeal was filed, the government has ceased using the term "classifiable." Thus, the only dispute before the district court has become moot and the district court's decision must be vacated.

A. The Dispute Concerning Use Of The Term "Classifiable" Is Now Moot

Plaintiffs' claim that the government was violating paragraphs (1) and (2) of section 630, by requiring federal employees to sign nondisclosure agreements covering "classifiable" information that has never been classified, has now become moot.[16/] As a result of a subsequent court order, defendants no longer use either the challenged nondisclosure forms, SF 189 and Form 4193, or any other form containing the term "classifiable."

After its May ruling that section 630 was unconstitutional on its face, the district court held in July that the term "classifiable" was unconstitutionally vague

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16/ This issue of what information is covered by the nondisclosure agreement is analytically distinct from the second issue addressed by section 630 concerning the employee's knowledge of whether information is classified. See Point IB, infra.

and overbroad in violation of the First Amendment rights of government employees. 695 F.Supp. at 1202-04. Echoing section 630, the court held in NFEE v. U.S. and AFGE v. Garfinkel that nondisclosure forms could apply only to information that is classified, or information that meets the standards for classification and is in the process of a classification determination. Id.

The government did not appeal that constitutional ruling, and has since complied with it. Pursuant to the court's decision, the government has notified, or will notify, all employees who signed SF 189 or Form 4193 that the term "classifiable" is stricken from the agreement and that the forms cover only classified information or information that is in the process of a classification determination.

All such employees may also replace their old agreements with a new form that does not refer to "classifiable" information.[17/] The forms that have replaced SF 189 and Form 4193 (SF 312 and Form 4355) are consistent with section 630 in that they do not contain the term "classifiable" and apply only to classified information or

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17/ The fact that some former employees who signed nondisclosure agreements containing the term "classifiable" may not have received notice from the government of the recent changes to the agreement cannot sustain a live controversy as to the constitutionality of section 630. Former employees like present employees are no longer bound by the term "classifiable" in the agreements regardless of whether they receive notice, and the government has been enjoined from enforcing any nondisclosure agreement against any employee unless that employee receives notice. 695 F.Supp. at 1206. Defendants have thus represented that "all employees who signed SF 189 or Form 4193 will be notified" of the changes concerning "classifiable" information. Mot. to Aff. at 19 (emphasis added). In contrast, Congress did not mandate any notice procedures in section 630 although many employees had already signed the disputed agreements at the time of its enactment.

information that meets the standard for classification and is in the process of a classification determination.

As a result of these changes, there is no remaining dispute concerning the use of the term "classifiable" or the applicability of the nondisclosure agreements to information that is unclassified. Accordingly, the question of the constitutionality of those portions of section 630 relating to "classifiable" but unclassified information is now moot.

Moreover, the government agrees with that conclusion. "Because the word classifiable has been completely eliminated from the forms, there no longer is any live controversy in this case under subsection (2) of Section 630 . . . ." Motion to Affirm at 19; see also id. at 8, 14-15.

When a case becomes moot while on appeal, the judgment below must be vacated.[18/] United States v. Munsingwear, 340 U.S. 36 (1950). This Court should, therefore, remand the case with a direction to dismiss:

> [This] procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

Id. at 40.

B. There Is No Ripe Dispute Concerning Any Violation Of Section 630'S Knowledge Requirement

In addition to the ban on the term "classifiable" in section 630(2), section

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18/ While defendants appear to agree with much, if not all of our arguments regarding mootness, they incorrectly ask this Court to affirm rather than vacate the district court's decision. Thus, we are in fundamental conflict with defendants on the appropriate remedy in this case.

630(1) also provides that nondisclosure forms may apply only to: (a) information marked classified or (b) information that is "unmarked but known" by the employee to be either classified (e.g. oral information) or in the process of a classification determination.[19/] Papers filed in this Court suggest that there is disagreement between the parties concerning the interpretation of this knowledge requirement. However, the issue of any violation by defendants of this requirement was neither raised in the district court proceedings nor implicated in the evidence placed before the district court. Thus, the district court had no basis for considering

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19/ Section 630(1) refers to: "information . . . specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination."

these provisions of the statute and this Court, as a prudential matter, should not decide their constitutionality.[20/]

Defendants agree that these issues "are not ripe for resolution in the abstract posture of this case." Mot. to Aff. at 21.[21/] Absent an appropriate factual record, this Court cannot engage in the carefully calibrated review that is particularly necessary when adjudicating disputes between the political branches about separation of powers.

20/ Ripeness must be evaluated for each separate provision of section 630. "[E]ven where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality." Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 71 (1961); see Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979).

21/ See n.18, supra.

1. The potential issue of whether there is a conflict between section 630's knowledge requirement and the nondisclosure agreements was never before the district court

Plaintiffs made no claim in the district court that the challenged nondisclosure forms violated the knowledge requirement of section 630(1). A fortiori, plaintiffs made no claim that they were injured by any violation of section 630's knowledge requirement.[22] Thus, this case does not present a ripe dispute in which employees claim the protection of section 630's knowledge requirement against threatened or actual sanctions for disclosing information.[23] Accordingly,

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[22] Plaintiffs' affidavits relate only to the term "classifiable." They do not address defendants' interpretation of the knowledge requirement. See e.g., Affidavit of Perry Shankle, Exh. 15 to Plaintiffs' Motion for a Preliminary Injunction.

[23] There is no claim in the record below that defendants violated the statute's knowledge

(continued...)

this record presents no occasion to decide whether section 630's knowledge requirement conflicts with separation of powers principles.[24/]

Indeed, the district court's opinion does not mention the knowledge requirement and the court made no findings concerning whether the defendants violated that requirement.[25/] Under these circumstances,

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23/ (...continued)
requirement or that plaintiffs were chilled in the exercise of their First Amendment right to speak about unclassified information by any such violation. Such a claim would, of course, establish a ripe dispute. Meese v. Keene, 107 S.Ct. 1862 (1987).

24/ Plaintiffs agree that the constitutional issue only arises if the defendants have violated section 630. See Appellants' Brief, Point A.

25/ In the related cases, NFFE v. U.S. and AFGE v. Garfinkel, the district court rejected claims that the Constitution protected employees from liability for disclosures of classified information when they did not have actual knowledge that it was classified, 695 F.Supp. at 1203-04, but never addressed any violation of the knowledge requirement of section 630.

this Court "ordinarily will not decide questions not raised or litigated in the lower courts." Springfield v. Kibbe, 480 U.S. ___, 107 S.Ct. 1114, 1115 (1987); see City of Lockhart v. United States, 460 U.S. 125, 134 n.9 (1983). Amicus respectfully suggests that this sound rule of judicial administration should be followed in this case.

2. Any dispute that may exist concerning the knowledge requirement cannot be resolved on this empty record

Although the issue was not litigated below, plaintiffs now contend that there is a ripe dispute concerning the knowledge requirement of section 630 because defendant Garfinkel has interpreted the nondisclosure agreement to mean that employees can be punished for disclosures of information whenever they "reasonably should have known" that the information was classified

or in the process of a classification determination. 53 Fed. Reg. 38,279 (Sept. 29, 1988), amending 32 C.F.R. §2003.20(h); see also 52 Fed. Reg. 48,367 (Dec. 21, 1987). Plaintiffs assert that this announced standard violates section 630's requirement that an employee be sanctioned for disclosing unmarked classified information or information that is in the process of a classification determination only when that employee "knows" the information is classified or in the process of a classification determination.

Amicus agrees that the "reason to know standard" articulated by defendant Garfinkel could have a potential chilling effect. However, the existence or extent of any chill was never addressed by the district court. Instead, the attention of the district court and the parties was

focused on the language of the forms themselves, which are silent on the question of a knowledge requirement.[26] The agreements simply recite that covered employees shall not disclose classified information. JA at 15, 19-20.[27]

The difference between defendant Garfinkel's "reasonably should have known" formulation and section 630's knowledge

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[26] For precisely that reason, defendants argue that any objection to defendant Garfinkel's reason to know standard "should not be considered in the context of this case, which presents a challenge to the content of the forms themselves." Mot. to Aff. at 20.

[27] The successor to Form 4193, Form 4355, states that an employee may not disclose information that is marked SCI or that he or she knows to be SCI. It specifically imposes on the employee a duty to ascertain the status of information that he or she has reason to believe might be SCI. JA at 55. Form 4355 and SF 189 also recite that negligent handling of classified information could injure the United States. JA at 15, 19. As set forth above, plaintiffs below did not challenge these provisions of the forms as a violation of section 630 and they cannot appropriately be addressed on this record.

requirement cannot be resolved in the factual vacuum of this record. That is particularly so since the legislative history of section 630 does not illuminate the statute's knowledge requirement[28/] and there is no evidence in the record concerning the executive's application or interpretation of the requirement in any specific context.

In the absence of any factual record concerning defendants' interpretation of the knowledge requirement or whether such interpretation has injured plaintiffs in violation of section 630's knowledge requirement, there is no occasion to decide whether the knowledge requirement is consistent with separation of powers principles. "Courts do not review issues, espe-

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28/ See Conf. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987).

cially constitutional issues, until they have to." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154-55 (1951) (Frankfurter, J. concurring).

To the contrary, where the record is inadequate, "resolution of the constitutional issues presented . . . would not be appropriate." De Backer v. Brainard, 396 U.S. 28, 29 (1969). See also International Brotherhood of Teamsters v. Denver Milk Producers, 334 U.S. 809 (1948)("Because of the inadequacy of the record, we decline to decide the constitutional issue involved").

Not only is there no factual record concerning any violation of the knowledge requirement or any potential chill, but the district court never made the inquiry required by the separation of powers principles it invoked to invalidate section 630. Before the court can determine

whether those principles have been infringed, it must determine how the statute functions in order to decide if it "prevents the Executive Branch from accomplishing its constitutionally assigned functions." Nixon v. General Services Administration, 433 U.S. 425, 443 (1977), citing United States v. Nixon, 418 U.S. 683, 711-712 (1974). Here, the government supplied no evidence of any claimed need for a "reason to know" standard rather than an actual knowledge standard. See Nixon v. G.S.A., 433 U.S. at 441. Had such a showing been made, the district court would have been obliged to assess whether the impact of section 630 "is justified by an overriding need to promote objectives within the constitutional authority of Congress." Id. Because the knowledge requirement was never litigated below, the

record in this case is completely barren on both these pivotal questions.

In sum, the issue of the constitutionality of section 630's knowledge requirement is not ripe because there has been no claim or showing of any violation of that requirement or injury therefrom. Under these circumstances, the district court's decision should be vacated as premature. See Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147, 158 (1983)(vacating judgment of court of appeals and remanding to NLRB because NLRB had not decided whether the handbilling at issue was proscribed, thus making the constitutional question premature); Pennzoil Co. v. Texaco, Inc., 481 U.S. ___, 107 S.Ct. 1519 (1987)(reversing court of appeals decision and remanding case to district court with instructions to vacate order and dismiss complaint where

case was premature because district court failed to abstain pending appeal of state court judgment to state appellate court); see also U.S. v. Munsingwear, 340 U.S. 36 (1950).

In the alternative, the Court should vacate and remand the case for further consideration and findings by the district court. Such findings would have to include whether defendants have violated the knowledge requirement of section 630. Only after making such a finding should the district court consider the separation of powers question. At that point, an appropriate issue might be presented for review by the Court of Appeals and, eventually, this Court.

C. There Is No Ripe Dispute Concerning Any Violation Of The Provisions Of Section 630 Relating To Communications To Congress

Paragraph 3 of Section 630 prohibits the implementation or enforcement of non-disclosure agreements that obstruct an employee's right "to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress." Paragraph (4) bars any agreement from interfering "with the right of the Congress to obtain executive branch information." And paragraph (5) protects the existing statutory rights of signatories to the nondisclosure agreements. These provisions were designed to preserve the status quo regarding the existing rights of federal employees to petition Congress against infringement by the nondisclosure agreements and to protect Congress' right to obtain executive branch

information. See 133 Cong. Rec. H11,999 (daily ed. Dec. 21, 1987).

Consistent with these requirements of section 630, defendants' latest regulation expressly acknowledges that the nondisclosure agreements do not interfere with any statutory rights of employees to communicate with Members of Congress.[29/] Thus, there is no present violation of these provisions of section 630 and the district court should never have reached their constitutionality.

29/ SF 189 and its successor, SF 312, "do not supersede [the whistleblower protections of the Civil Service Reform Act, 5 U.S.C. §2302] . . . or any other laws of the United States." 53 Fed. Reg. 38,279 (Sept. 29, 1988), amending 32 C.F.R. §2003.20(g). For example, 5 U.S.C. §7211 provides: "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

There is nothing in the record concerning Form 4193 on this issue.

In that regard, the district court made no finding that defendants had violated the congressional communication provisions of section 630 and the record contains no showing of any such violation. Specifically, the district court never addressed whether defendants had attempted to impose a prior authorization requirement on employees' communications to Congress; nor did the court consider whether such a requirement, if it existed, interfered with either the rights of employees or of the Congress in violation of section 630.30/

The district court never considered, therefore, whether there was any ripe case

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30/ The district court's "assumption" that defendants had not complied with section 630 appears to be based solely on the defendants' use of the term "classifiable" in SF 189 and Form 4193. 688 F.Supp. at 683 n.16. As noted previously, that term is no longer in use in the revised nondisclosure agreements.

or controversy concerning the congressional communication provisions of the statute.[31/] As defendants point out, the constitutionality of any congressional prohibition on a prior authorization requirement need not be reached in this "abstract and speculative context." Mot. To Aff. at 27.

Furthermore, the record evidence is insufficient to support a finding that defendants have violated these provisions of section 630. On their face, neither of the challenged nondisclosure agreements speaks to disclosures to Congress, much less imposes a prior authorization

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31/ Two months later in the related cases, NFEE v. U.S. and AFGE v.Garfinkel, the district court held on a virtually identical record that the issue of whether the nondisclosure agreements violate statutory rights of federal employees to communicate with Congress was "a question the court need not address," because "[n]one of the plaintiffs claims that any obligation created by the agreements has been invoked to bar their communication with Congress." 695 F.Supp. at 1199.

requirement on such disclosures. Form 4193 prohibits disclosures to "unauthorized persons" but nowhere defines such persons. JA at 19. Consequently, the "prior authorization" requirement in Form 4193 only applies to disclosures to "unauthorized persons." Defendants themselves have long recognized, however, that Members of Congress are in fact authorized to receive classified information.32/ Accordingly, the fairest reading of Form 4193 is that it does not apply to disclosures to Congress and therefore does not conflict with section 630.

SF 189 also prohibits disclosures to "unauthorized persons" without defining such persons. It requires the employee to obtain "official verification" that the

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32/ See p.56, infra.

recipient of the information has been properly authorized by the "United States government" to receive information before disclosing it. JA at 15. Thus, SF 189 on its face appears to require an employee who has information to disclose to Congress to obtain "official verification" from Congress that Congress is authorized to receive the information before disclosing it. This interpretation is confirmed by the applicable regulation, which states that the form does not conflict with any existing and statutorily guaranteed rights of employees. 53 Fed. Reg. 38,279 (Sept. 29, 1988), amending 32 C.F.R. §2003.20(g).

In short, there is no factual basis on the present record for finding any violation of paragraphs (3) through (5) of

section 630.[33/] In the absence of such violation there was no reason for the district court, and there is no reason for this Court, to reach out and decide a constitutional issue that is not presented and may never develop.

Through the years the legislative and executive branches have worked out a careful accommodation to ensure that each branch has the information it needs to perform its constitutional function. If and when that accommodation breaks down, this Court's intervention may well be required. This case, however, does not present evidence of that breakdown and this Court should refrain from interfering with

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33/ Plaintiffs do not argue that defendants have violated paragraphs (3)-(5) of section 630, only that notice should be given to all employees that, under the applicable regulation, the forms do not conflict with their statutory rights. Whether such notice would be wise is not an issue in this case.

the delicate balance that the political branches have worked out in this sensitive area.

II. IN THE ALTERNATIVE, THIS COURT SHOULD REVERSE THE DISTRICT COURT'S DECISION ON THE MERITS BECAUSE NATIONAL DEFENSE AND FOREIGN AFFAIRS POWERS ARE NOT EXCLUSIVE TO THE EXECUTIVE BRANCH

The district court struck down section 630 as a violation of separation of powers on the ground that the President alone can make policy regarding national security information. The court correctly recognized that "[n]either political branch is expressly charged by the Constitution with regulating accumulation of or access to national security information," 688 F.Supp. at 685, but erroneously concluded from that premise that Congress lacks any authoritative role in the formulation of policy

regarding national security information.[34/] Because it failed to acknowledge that Congress and the Executive are partners in the formulation of national defense and foreign affairs policy, the decision of the district court must be reversed.

A. Congress And The President Share Constitutional Authority To Make Policy On The Uses Of National Security Information

The district court ignored the framework for determining the allocation of powers between the legislative and executive branches that this Court articulated in Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952), and reaffirmed in subse-

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34/ The district court did acknowledge defendants' admission that a "categorical division of responsibility between the Legislative and Executive is not possible" in this area. 688 F.Supp. at 684. The court, however, did not factor congressional power into its analysis beyond suggesting that Congress could provide "criminal and civil sanctions" to punish disclosures of information.

quent decisions. See e.g., Morrison v. Olson, 108 S.Ct. 2597 (1988); Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Nixon, 418 U.S. 683, 707 (1974). As Justice Jackson observed in his famous concurrence in Youngstown: "Presidential powers are not fixed, but fluctuate, depending on their disjunction or conjunction with those of Congress." 343 U.S. at 635. Here, Congress has twice disapproved specific aspects of the President's nondisclosure agreements. See pp. 6-10, supra. By discrediting that disapproval, the district court assaulted the very premise of Youngstown: that the powers of government are shared between the Executive and Congress and, correspondingly, that the authority of those co-equal branches may be

mutually constraining even in matters of national defense and foreign affairs.35/

Because the district court held that executive power simply trumps legislative power in this area, it neglected to inquire how authoritative executive and legislative voices might be harmonized. Recognition of some congressional role would not, as the district court seems to have assumed, shift unilateral, plenary power over national

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35/ The district court's opinion rests on a mistaken reading of United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). In the district court's view, Curtiss-Wright described a role for the President in foreign affairs so broad that it requires judicial elimination of any authoritative congressional role in matters even indirectly related to presidential functions. As this Court's subsequent cases make clear, see e.g., Youngstown, 343 U.S. at 635 n.2, Curtiss-Wright stands for the more modest proposition that Congress may broadly delegate powers to the President in foreign affairs. The Curtiss-Wright opinion nowhere suggests that Congress is required to so delegate. And it is clearly inconsistent with the very premise of the opinion to conclude that Congress has no power to delegate.

security information from the Executive to Congress. Where the coordinate political branches share power, the appropriate test of the validity of congressional action is whether it "disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions." Morrison v. Olson, 108 S.Ct. at 2621, quoting Nixon v. General Services Administration, 433 U.S. at 443, citing United States v. Nixon, 418 U.S. at 711-12.

Clearly, that is not the case here. There has been no showing that in protecting the First Amendment rights of federal employees to discuss unclassified information and in preserving its own access to information, Congress prevented the Executive from performing its constitutionally assigned function.

B. The President's Powers In National Defense And Foreign Affairs Do Not Bar Congress From Legislating To Protect Individual Constitutional Rights

The district court's opinion needlessly impugns the ability of Congress to protect constitutional values and protect individual rights through its legislative powers. Section 630 reflects congressional concern that restrictions on the release of "classifiable" information would chill debate over national defense and foreign affairs issues in both the public and the legislative arena. That judgment is well within its constitutional authority.

The district court's contrary view reflects neither political reality nor constitutional doctrine. Indeed, only two months after its decision in this case, the district court rejected the notion of exclusive, executive branch author ty over

national security information by ruling that use of the term "classifiable" in the nondisclosure agreements was unconstitutional. NFFE v. U.S., 695 F.Supp. at 1202-04.

Congress, no less than the executive and judicial branches, is obligated to uphold the Constitution and may exercise the national defense and foreign policy powers that it shares with the Executive to fulfill that obligation. Cf. Katzenbach v. Morgan, 384 U.S. 641 (1966). Only this Court, of course, can issue authoritative interpretations of the Constitution. See Marbury v. Madison, 5 U.S. 137 (1803). But nothing in the doctrine of judicial review precludes Congress from refusing to fund an unconstitutional policy devised by the Executive. In performing that role here, Congress was merely fulfilling its

"assigned constitutional function." Morrison v. Olson, 108 S.Ct. at 2621. Its action in that regard is fully consistent with the doctrine of separation of powers.

C. The President's Powers In National Defense And Foreign Affairs Do Not Bar Congress From Legislating To Protect Its Own Constitutional Lawmaking Function

Congress and the Executive regularly share authority over national defense matters and regularly share national security information. To choose just one example, Congress exercises institutional oversight over intelligence activities that reflects an explicit understanding that both political branches have responsibility for national defense and foreign affairs and that neither can fulfill that constitutional responsibility without adequate information. As stated in the Conference

Report to the Intelligence Oversight Act of 1980[36]:

> Neither the executive branch nor the legislative branch is giving up any powers, authorities or rights it may have; rather, both branches recognize the powers, rights, authorities and duties of the other. Through this legislation there are established procedures by which both branches may carry out their separate and joint responsibilities and duties to protect the nation through the use of intelligence information.

Conf. Rep. No. 1350, 96th Cong., 2d Sess. 15, reprinted in 1980 U.S. Code Cong. & Adm. News 4207, 4212.

The potential impact of the district court's ruling on this sharing of power between the political branches is quite

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[36] 50 U.S.C. §413. The Act specifies procedures whereby Congress will be kept "fully and currently informed" of intelligence activities. 50 U.S.C. §413(a)(1).

far-reaching.[37] Congress has frequently exercised its power to withhold spending for executive policies that clash with its foreign policy vision,[38] and has legislated to require disclosure of information in executive hands on numerous occasions.[39]

Indeed, it is much closer to the truth that the district court's opinion would prevent the Congress from performing its

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[37] The district court minimized the impact of its decision by noting that the Executive might choose to exchange national security information with Congress in a spirit of "cooperation." 688 F.Supp. at 685. But today's cooperation can become tomorrow's intransigence. Recognizing that reality, the framers of the Constitution did not rest on such ephemeral guarantees.

[38] For example, the so-called Boland Amendment placed well-publicized restrictions on the Executive's ability to fund the Nicaraguan contras. See Dept. of Defense Appropriations Act, Pub. L. No. 98-473, §8066, 98 Stat. 1837, 1935 (1985).

[39] See Nixon v. General Services Administration, 433 U.S. at 445 (and statutes cited therein).

constitutionally assigned function. As this Court has long recognized, "the power of inquiry . . . is an essential and appropriate auxiliary to the legislative function." McGrain v. Daugherty, 273 U.S. 135, 174 (1927), cited in Morrison v. Olson, 108 S.Ct. at 2621.[40/] Even executive powers expressly granted in the Constitution, let alone the implied executive authority invoked in this case, cannot be so strong as to defeat the very operation of a constitutionally co-equal branch.

40/ See Koh, "Why The President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair," 97 Yale L.J. 1255, 1284 (1988)("Congress' constitutional right to participate in the setting of foreign policy objectives must carry an attendant right to information and consultation").

CONCLUSION

For the reasons stated herein, the decision below should either be vacated or reversed.

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AMERICAN FOREIGN SERVICE ASSOCIATION, ET AL.,
APPELLANTS

v.

STEVEN GARFINKEL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME AND BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE

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MOTION OF THE UNITED STATES SENATE FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME

For the following reasons, the United States Senate respectfully moves for leave to file the attached brief *amicus curiae*.

The Senate may direct its Legal Counsel to appear as *amicus curiae* in its name "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." 2 U.S.C. § 288e(a) (1982). Appearing under this authority, the Senate has previously defended in this Court acts of Congress whose constitutionality has been challenged by the executive branch. *E.g.*, *Morrison v. Olson*, 108 S.Ct. 2597 (1988). In this appeal, the executive branch, depending on how issues of mootness, ripeness, and statutory interpretation are resolved, has questioned the constitutionality of an act of Congress.

Permission for the Senate to appear is of right and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). The brief for appellants was filed on December 29, 1988. The

brief for appellees is due to be filed by February 16, 1989. Under Rule 36.2 of this Court the brief of an *amicus curiae* shall be filed "within the time allowed for the filing of the brief of the party supported and if in support of neither party, within the time allowed for filing appellant's or petitioner's brief." The appellants are asking for reversal of the district court's judgment, while the appellees have moved to affirm that judgment. The brief which the Senate is seeking leave to file suggests to the Court that the appropriate disposition of this case is to vacate the judgment as moot in part and as unripe in part. Under the Court's rules our brief should have been filed by December 29, 1988, as it supports neither the disposition sought by the appellants nor the disposition requested by the appellees in their motion to affirm.

By law the Senate must agree to a resolution to authorize its Legal Counsel to appear in a case in the name of the Senate. 2 U.S.C. § 288b(c) (1982) ("The Counsel shall intervene or appear as amicus curiae . . . only when directed to do so by a resolution adopted by the Senate. . . .") The 100th Congress had already adjourned *sine die* when this Court noted probable jurisdiction on October 31, 1988. The brief for appellants was filed during the adjournment *sine die*. The 101st Congress convened on January 3, 1989. After swearing in new members, electing a President pro tempore, and undertaking other purely organizational activities on January 3, and joining the House of Representatives for the counting of the electoral ballots on January 4, the Senate adjourned until January 25, 1989. The resolution to authorize the Senate's appearance in this appeal, S. Res. 42, 101st Cong., 1st Sess., 135 Cong. Rec. S1161-62 (daily ed. Feb. 2, 1989) (text of resolution and statement of Sen. Mitchell), was acted on during the Senate's first full week of meetings in the 101st Congress.

The legislative calendar has been only one consideration. The principal factor governing the timing of this brief has been the need to develop a position on the issues

involved that accounts for the views of interested members of the Senate. Until that occurred, we could not present to this Court, as we are able now to do, a brief on behalf of the United States Senate. We have advised counsel for the parties in advance of the filing of this motion about the arguments that the Senate proposes to offer to the Court. Neither the appellants nor the appellees oppose the grant of our motion for leave to file.

Both the constitutional issues in this case, and the question of the need to decide them, are of considerable importance to the Senate. In the special circumstances described above, we request the opportunity to file the attached brief at this time.

Respectfully submitted,

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FEBRUARY 1989.

TABLE OF CONTENTS

	Page
Interest of the United States Senate	1
Statutory Provisions Involved	2
Summary of Argument	3
Argument:	
The Judgment of the District Court Should Be Vacated Because There Is No Present Case Or Controversy	5
1. Congress Enacted Section 630 to Respond to the Executive's Use in Nondisclosure Agreements of the Term "Classifiable"	8
2. Elimination of "Classifiable" From the Form Agreements Moots the Controversy About That Term	12
3. No Dispute About Any Other Part of Section 630 Is Ripe for Review	15
a. Potential Disagreements Over the Knowledge Requirement in Subsection 1 Do Not Present a Ripe Controversy	16
b. Neither Is the Potential Issue Under Subsection 3, About Prior Authorization for Disclosures to Congress, Ripe for Review	19
4. Vacating the Judgment Will Also Serve to Avoid Involving the Court in the Resolution of Open Political Issues Between the Representative Branches	21
Conclusion	23

TABLE OF AUTHORITIES

Cases:	
Baker v. Carr, 369 U.S. 186 (1962)	19

Page

Cases—Continued

Bowsher v. Synar, 478 U.S. 714 (1986) 7
Buckley v. Valeo, 424 U.S. 1 (1976) 7
EPA v. Brown, 431 U.S. 99 (1977) 7
Goldwater v. Carter, 444 U.S. 996 (1979) 22
Honig v. Doe, 108 S.Ct. 592 (1988) 14
INS v. Chadha, 462 U.S. 919 (1983) 7
Morrison v. Olson, 108 S.Ct. 2597 (1988) 7
Murphy v. Hunt, 455 U.S. 478 (1982) 14
National Federation of Federal Employees v. United States, 695 F. Supp. 1196 (D.D.C. 1988), *appeals docketed*, Nos. 88-5402 & 88-5404 (D.C. Cir.) 14
Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911) 15
United Public Workers v. Mitchell, 330 U.S. 75 (1947). 21
United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977).. 6
United States v. Munsingwear, 340 U.S. 36 (1950) 1, 15

Statutes:

Foreign Relations Authorization Act of 1972, Pub. L. No. 92-352, § 502, 86 Stat. 489 6
Department of State Appropriations Authorization Act of 1973, Pub. L. No. 93-126, § 17, 87 Stat. 451.... 7
Continuing Appropriations Resolution, 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987) 2
Treasury, Postal Service and General Government Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-391 (1987) 1, 2
Treasury, Postal Service and General Government Appropriations Act, 1989, Pub. L. No. 100-440, 102 Stat. 1721 (1988) 2
National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, 102 Stat. 1918 (1988) 22
2 U.S.C. § 194a (1982) 6
5 U.S.C. § 7211 (1982) 5, 6, 20

Congressional and Miscellaneous:

Intelligence Oversight Act of 1988, S. 1721, 100th Cong., 2d Sess. (1988) 22
S. Rep. No. 754, 92d Cong., 2d Sess. (1972) 6-7
S. Rep. No. 276, 100th Cong., 2d Sess. (1988) 23
H.R. Rep. No. 705, Pts. 1 & 2, 100th Cong., 2nd Sess. (1988) 22

Page

Congressional and Miscellaneous—Continued
H.R. Conf. Rep. No. 498, 100th Cong., 1st Sess. (1987). 12
Report of the Congressional Committees Investigating the Iran-Contra Affair, S. Rep. No. 216 and H.R. Rep. No. 433, 100th Cong., 1st Sess. (1987) 6, 22
119 Cong. Rec. 19231 (1973) 7
134 Cong. Rec. S2249 (daily ed. Mar. 15, 1988) 22
135 Cong. Rec. S23 (daily ed. Jan. 3, 1989) 22
135 Cong. Rec. S278-83 (daily ed. Jan. 25, 1989) 22
Prepublication Review and Secrecy Agreements: Hearings Before the Subcomm. on Oversight of the House Permanent Select Comm. on Intelligence, 96th Cong., 2d Sess. (1980) 9
Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 98th Cong., 1st & 2d Sess. (1984) 8, 9, 16
National Security Decision Directive 84: Hearing Before the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess. (1983) 9
Classified Information Nondisclosure Agreements: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service, 100th Cong., 1st Sess. (1987) 9-10, 11
Congress and the Administration's Secrecy Pledges: Hearing Before a Subcomm. of the House Comm. on Government Operations, 100th Cong., 2d Sess. (1988) 18
Oversight Legislation: Hearings on S. 1721 and S. 1818 Before the Senate Select Comm. on Intelligence, 100th Cong., 2d Sess. (1988) 22
Executive Order 12356, 47 Fed. Reg. 14,876 (1982) 10
24 Weekly Comp. Pres. Doc. 1189 (Sept. 26, 1988) 15
24 Weekly Comp. Pres. Doc. 1377 (Oct. 31, 1988) 22
52 Fed. Reg. 28,802 (Aug. 3, 1987) 12
52 Fed. Reg. 48,367 (Dec. 21, 1987) 13
53 Fed. Reg. 38,278 (Sept. 29, 1988) 14, 15, 17, 18
32 C.F.R. § 2003.20 ..... 12, 13, 14, 17, 18

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v.

STEVEN GARFINKEL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE

INTEREST OF THE UNITED STATES SENATE

If the merits were to be reached, this appeal would present a fundamental issue about Congress's authority to legislate a necessary and proper balance between the benefits of secrecy and the needs of an informed public and Congress in protecting the nation's security. Because the district court failed to give due weight to Congress's constitutional responsibilities, the United States Senate has a strong interest in reversal or vacation of the judgment invalidating section 630 of the Treasury, Postal Service and General Government Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-391, 1329-432. As no case or controversy presently requires this Court to adjudicate the merits of this case, the interests of the political branches would be served best by the vacating of the judgment below so that it will not "spawn[ ] any legal consequences," *United States v. Munsingwear*, 340 U.S. 36, 41 (1950), governing the balance between them.

STATUTORY PROVISIONS INVOLVED

Section 630 of the Treasury, Postal Service and General Government Appropriations Act, 1988, 101 Stat. 1329-391, 1329-432, was enacted as part of the Continuing Appropriations Resolution, 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987). Section 619 of the Treasury, Postal Service and General Government Appropriations Act, 1989, Pub. L. No. 100-440, 102 Stat. 1721, 1756 (1988), extends section 630 through Fiscal Year 1989. We will refer to them collectively as "section 630," which provides:

SEC. 630. No funds appropriated in this or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement:

(1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination;

(2) contains the term "classifiable";

(3) directly or indirectly obstructs, by requirement of prior written authorization, limitation of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress;

(4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress;

(5) imposes any obligations or invokes any remedies inconsistent with statutory law: *Provided*, That nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)-(5) of this section.

SUMMARY OF ARGUMENT

The district court grounded its invalidation of section 630 on an insupportably limited view of the national security powers that the Congress shares with the President. In performing its constitutional responsibilities the Congress has a great need for information from officials of the executive branch. As the judgment of the district court threatens to undermine the balance between the legislative and executive branches, we support appellants' constitutional arguments if it is necessary to reach the merits of this controversy.

The merits need not be reached, however. Disputes over the information that both political branches need to perform their constitutional responsibilities have been left historically to accommodation between the President and the Congress. Through the efforts of federal employees, their unions, the Congress, executive officials, and the district court in the companion cases, no present case or controversy necessitates a judicial determination of the fundamental issues that are otherwise presented.

1. The primary purpose of section 630 was to eliminate the uncertainty from nondisclosure agreements that had been caused principally by the vague term "classifiable." The President issued National Security Decision Directive 84 to require that every person with access to classified information sign a nondisclosure agreement. Although the President's directive applied only to disclosure of "classified" information, the implementing forms also prohibited the disclosure of "classifiable" information. Executive branch personnel objected to the vagueness of the term "classifiable," and unions of federal employees commenced actions to challenge its use. The Congress also focused on the term "classifiable" when it enacted section 630; subsection 2 of the measure specifically prohibited its use. The Congress was concerned that the term's vagueness would reduce the flow to the public and to the Congress of valuable nonclassified information.

2. The issuance of new agreements which do not contain the term "classifiable" has mooted the controversy over that term. In March, 1988, the Director of Central Intelligence issued Form 4355 to replace Form 4193 concerning the disclosure of information about, or derived from, sources and methods of intelligence. Then, in September, 1988, after the entry of the judgment below but before probable jurisdiction was noted in this Court, the Director of the Information Security Oversight Office issued Form 312. Neither form contains the prohibited term. The major problem which the Congress sought to address in enacting section 630 has been resolved.

3(a). Pursuant to subsection 1 of section 630, federal funds may be used to implement only nondisclosure agreements that concern information that is marked as classified or, if unmarked, is "known" by the employee who has signed the agreement to be classified or in the process of classification. The dispute about this requirement is not ripe. Appellants correctly observe that Congress enacted this requirement to make certain that federal agencies would not reintroduce the uncertainty that had been created by the vague term "classifiable." The new forms that have been issued without the term "classifiable" place a duty on employees to "consult" or "confirm" with other officials when they are uncertain about the classification status of information. On their face these modest and specific duties do not engender the great uncertainty that had been caused by the term "classifiable." A ripe controversy might arise only if the duty to "consult" or "confirm" is implemented in a way that re-creates the uncertainty in the scope of a federal employee's obligations that section 630 was intended to avoid.

3(b). A question under the remaining portion of section 630 arises, if at all, only if subsection 3 is read to bar the executive branch from requiring its employees to obtain authorization from superior officials prior to communicating classified information to the Congress. No ripe contro-

versy about the meaning or constitutionality of subsection 3 is presented on this appeal, however. No restriction on disclosures to the Congress appears on the face of the confidentiality agreements. Neither the complaints nor the affidavits of federal employees describe an instance in which, on the basis of a nondisclosure agreement, any federal employee has sought or been denied permission to provide classified information to the Congress. Furthermore, vacating for lack of ripeness would be consistent with the district court's dismissal for lack of ripeness of a similar claim that the nondisclosure agreements violate the Lloyd - La Follette Act, 5 U.S.C. § 7211, which protects the right of federal employees to petition the Congress.

4. Vacating the judgment will also serve to avoid involving the Court in the determination of unresolved political matters between the legislative and executive branches. The matters involved range from proposals for new legislation on whistleblowers to proposals for new legislation on executive reporting to the Congress about anticipated covert intelligence operations. The resolution of these sensitive matters is best left to the continuing process of communication and accommodation between the representative branches.

ARGUMENT

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE VACATED BECAUSE THERE IS NO PRESENT CASE OR CONTROVERSY

The district court's judgment that section 630 is unconstitutional is premised on a parsimonious view of the powers and responsibilities of the Congress. Against "the constitutional and traditional role of the Executive in assuring the nation's security and gathering and protecting the information essential to that security," J.S. 25a, the district court perceived only a limited congressional function. In its view, "[h]istorically, the role of Congress in this arena has been to facilitate secrecy with appropriate criminal and civil sanctions." *Id.* at 26a. Not surprisingly, the Congress begins with a different premise, that "the conduct of foreign policy [i]s a shared power between Con-

gress and the President." [1] The Constitution assigns significant national security powers to the President, but it also "confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the case of the Senate, consent to treaties and the appointment of ambassadors." [2]

If the district court's judgment were to stand, the delicate balance which now exists between the legislative and executive branches in carrying out their respective constitutional responsibilities concerning national defense and foreign policy would be seriously undermined. In exercising its responsibilities under the Constitution, the Congress has a great need for candid communications from executive branch officials and employees. It has mandated that "[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." [3] It has protected the right of each executive branch employee whose duties relate to foreign policy, such as members of the appellant association, to "express his views and opinions, and make recommendations he considers appropriate, if the request of the committee [of Congress] or member of the committee relates to a subject which is within the jurisdiction of that committee." [4] Consistent with these interests, we join the appellants' defense of the constitutionality of section 630.

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[1] *Report of the Congressional Committees Investigating the Iran-Contra Affair*, S. Rep. No. 216 and H.R. Rep. No. 433, 100th Cong., 1st Sess. 388 (1987).

[2] *United States v. AT&T*, 567 F.2d 121, 128 (D.C. Cir. 1977).

[3] 5 U.S.C. § 7211 (1982).

[4] 2 U.S.C. § 194a (1982). Protection for the candid expression of views by foreign service officers derives from the Foreign Relations Authorization Act of 1972, Pub. L. No. 92-352, § 502, 86 Stat. 489, 496. The Senate Committee on Foreign Relations explained that "[a]ll too often Executive Branch witnesses seem to be afraid to respond candidly to

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The mutual interests of the political branches in a balanced and effective government will not be advanced, however, by an adjudication of the merits of this case. Unlike other controversies in which the Court has decided disputes between the Congress and the President about the structure of constitutional government,[5] this appeal is not about the bold outlines of the separation of powers. Instead, this case addresses the shared interests of the executive and legislative branches in the information which each must have to perform its constitutional tasks. Over the long haul of our constitutional history the Congress and the President have resolved together questions about the sharing of information. Although they often disagree about access to facts and opinions, the President and the Congress recognize that they have a mutual interest in practical efforts to achieve accommodation.

Fortunately, a decision on the merits is avoidable as "the litigation has undergone a great deal of shrinkage since the decision[ ] below. . . ." *EPA v. Brown*, 431 U.S. 99, 103 (1977) (per curiam). As a result of the efforts of all the participants in this controversy—the individual feder-

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questions put to them for fear of departing in any way from official policy. This provision will give them statutory encouragement to speak frankly to the Committee." S. Rep. No. 754, 92d Cong., 2d Sess. 97 (1972). In 1973 the Congress expanded this protection from officers confirmed by the Senate to all employees of foreign affairs agencies. Department of State Appropriations Authorization Act of 1973, Pub. L. No. 93-126, § 17, 87 Stat. 451, 455; *see* 119 Cong. Rec. 19231 (1973) (remarks of Chairman Fulbright stating that measure is "another step to try to reestablish a proper relationship between Congress and the President on foreign policy matters").

[5] *E.g., Buckley v. Valeo*, 424 U.S. 1 (1976) (officers of the Congress may not appoint officers of the United States); *INS v. Chadha*, 462 U.S. 919 (1983) (one House of Congress may not override the exercise of statutory authority by an officer of the United States); *Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress may not delegate executive power to an officer over whom it has reserved the power of removal); *Morrison v. Olson*, 108 S.Ct. 2597 (1988) (Congress may assign to a court the power to appoint an independent prosecutor).

al employees who objected to vague terminology in earlier secrecy agreements, the unions that helped these employees present their grievances, the members of Congress who negotiated with the executive branch and sponsored hearings and legislation (on our side, Senators Grassley, Pryor, and Proxmire), the district court in the companion cases, and the executive branch officials who responded to the legislation and to the recent orders of the district court—the standard secrecy agreements have been amended to resolve the basic objection that had been lodged against them. The route to compliance may not have been as direct as possible, but Congress's primary objective in enacting section 630 has been attained. The harm that the district court's judgment might cause to the constitutional balance between the political branches may be avoided by vacating that judgment on the ground that the only ripe part of this controversy is now moot.

1. Congress Enacted Section 630 to Respond to the Executive's Use in Nondisclosure Agreements of the Term "Classifiable"

The President's goal in issuing National Security Decision Directive ("NSDD") 84 was to restrain the disclosure of "classified" information. J.A. 11. The directive was based upon an interdepartmental report about "unauthorized disclosures of classified information . . . [that] primarily occur through media 'leaks' by anonymous government employees, or in publications and statements by former employees." [6] On announcing the issuance of the NSDD in March, 1983, the Department of Justice stressed that "[t]he directive deals only with disclosures of *classi-*

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[6] *Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st & 2d Sess. 166 (1984) ("*1983-84 House Judiciary Comm. Hearings*") (text of report).

fied information." [7] During hearings held later in 1983 on other provisions of the NSDD, administration witnesses underscored their intent "not to interfere with the free flow of unclassified information to the public," while restating their view that there is "no . . . right of public access to classified information, and that is what the directive is designed to deal with." [8]

Although the President's directive addressed the disclosure of "classified" information only, Form 189, which was promulgated in August, 1983, to implement NSDD 84, and Form 4193, which had been prescribed earlier by the Director of Central Intelligence for sensitive compartmented information ("SCI"), also barred the disclosure of "classifiable" information.[9] A sustained controversy about the term "classifiable" did not occur, however, until a number of executive branch employees objected to the confidentiality forms when they were presented to them for signature several years later.[10]

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[7] *National Security Decision Directive 84: Hearing Before the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. 88 (1983) ("*1983 Senate Hearing*") (emphasis in original).

[8] *1983-84 House Judiciary Comm. Hearings, supra* note 6, at 77 (testimony of Dep. Ass't Att'y Gen. Richard K. Willard). Among the matters *not* covered by the report that preceded the issuance of NSDD 84 were "leaks of unclassified information." *Id.* at 166; *see also id.* at 170.

[9] J.A. 15 (Form 189, § 1); J.A. 19 (Form 4139, § 1). *See Prepublication Review and Secrecy Agreements: Hearings Before the Subcomm. on Oversight of the House Permanent Select Comm. on Intelligence*, 96th Cong., 2d Sess. 12 (1980) (CIA policy against disclosure of information "which is classifiable pursuant to law or Executive order but which, because of operational circumstances or oversight, is not formally classified by designation and marking").

[10] While several senators promptly questioned the use of the word "classifiable," *1983 Senate Hearing, supra* note 7, at 13-14, 20, 39-40 (Senator Eagleton); *id.* at 16-17 (Senator Levin), the Congress focused initially on issues presented by the NSDD's provisions on prepublication review and the use of polygraphs in leak investigations. Many federal employees were not asked to sign an agreement until several years after forms were promulgated. *Classified Information Nondisclosure Agreements: Hearing Before the Subcomm. on Human Resources of*

Continued

The declaration below of an Air Force atmospheric physicist gives this case, with the large issues that it has engendered, a specific mooring. H. Stuart Muench was presented with Form 189 in September, 1986, and was directed to return it in four days.[11] In order to limit his agreement to "information that is classified under the standards of Executive Order 12356," Muench struck "classifiable" from the form.[12] He was concerned, because Executive Order 12356, § 1.3(a)(6), allows classification of "scientific, technological, or economic matters relating to the national security," 47 Fed. Reg. 14,876 (1982), that the term "classifiable" would limit what he could say in "every paper, letter, talk, discussion" after leaving government.[13] After the Air Force initiated procedures to revoke his security clearance, Muench signed an unredacted Form 189 but appended a memorandum [14] indicating that he understood by reference to a Department of Defense pamphlet that " 'classifiable' refers to information that meets the criteria for classification under Executive Order 12356, but which has not yet been properly marked because of time limitations, oversight or error." [15]

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the House Comm. on Post Office and Civil Service, 100th Cong., 1st Sess. 68 (1987) ("*1987 House Hearing*") (Information Security Oversight Office ("ISOO") fact sheet on status of Form 189) (1987); *id.* at 87-88 (Air Force first implemented procedures for the use of Form 189 in response to DOD directives in 1985).

[11] Opposition to Defendants' Motion to Dismiss, Exh. 3, Declaration of H. Stuart Muench at 1 (filed Nov. 20, 1987), *National Federation of Federal Employees v. United States*, C.A. No. 87-2284 (D.D.C.).

[12] *Id.* at 2 & Att. 2.

[13] *Id.*, Att. 2A.

[14] *Id.* at 4 & Att. 11.

[15] Opposition to Defendants' Motion to Dismiss, Exh. 4, DOD5200.1-PH-1, at 29. *See also* Supplemental Statement of Opposition to Defendants' Motion to Dismiss, Declaration of Louis C. Brase at 5 (¶ 2) (filed Jan. 12, 1988), *American Federation of Government Employees, AFL-CIO v. Garfinkel*, C.A. No. 87-2284 (D.D.C.) (objecting that term "classifiable" in secrecy agreements "must necessarily inhibit my free communication of *unclassified* information to Congress and the public") (emphasis in original).

The vagueness of the term "classifiable" became the central issue both in the district court and in the Congress. The National Federation of Federal Employees sought an injunction against any nondisclosure agreement "which prohibits the disclosure of 'classifiable' information," complaining that Form 189

> requires employees to speculate as to what should have been or could have been designated "classified." Speculation is not an appropriate condition of continuing employment or security clearance coverage. . . . The term "classifiable" is vague and overbroad. Out of fear of breaching the terms of SF-189, employees will not disclose information which is, in fact, legally disclosable.[16]

Senator Grassley, objecting to "vague, ambiguous and, in places, very unintelligible" language throughout Form 189, stated that "[t]he classic example of this problem is the term 'classifiable.' " [17]

Members feared that the vagueness of the term "classifiable" threatened to " 'chill[ ] or discourage[ ] the disclosure of any information which evidences waste, fraud, corruption or illegality in government . . . in contrast to and in derogation of the intended results of the whistleblowing statute.' " [18] The conferees emphasized that the administration's secrecy agreements oblige federal employees

> to safeguard not only information which is properly classified pursuant to executive order, but any

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[16] Complaint at 6, 4, 6 (filed Aug. 17, 1987), *National Federation of Federal Employees v. United States*, C.A. No. 87-2284 (D.D.C.); the union filed two amended complaints.

[17] *1987 House Hearing*, *supra* note 10, at 9.

[18] *Id.* (quoting American Law Division, Congressional Research Service, Memorandum on Effect of Secrecy Agreements on Whistleblowing Protections, July 28, 1987). That memorandum (reprinted in *id.* at 157-64) argued that "[t]he restrictions in the secrecy agreement on the disclosure of information which is not specifically classified under the Executive Order, but merely 'classifiable,' raise questions as to the consistency of the agreement with the whistleblowing protections of federal law. . . ." *Id.* at 160.

> information which may be considered to be "classifiable." This overbroad and ambiguous language results in a chilling effect on the first amendment rights of government employees, including their ability to communicate directly with members of Congress.[19]

The conferees understood that the primary purpose of section 630 was "to address the dubious concept of 'classifiable' information." *Id.*

2. Elimination of "Classifiable" From the Form Agreements Moots the Controversy About That Term

During a fourteen-month period beginning in August, 1987, executive officials, litigants, the Congress, and the district court all took steps to remedy the concerns of federal employees about the use of the term "classifiable." These efforts bore final fruit following the judgment of the district court when the Information Security Oversight Office issued a new form that omitted the disputed term.

Just prior to the plaintiffs' filing of the first of the actions consolidated below, administration officials sought to address the questions of federal employees about the term "classifiable" by explaining in the Federal Register that the term "classifiable" in Form 189 "refers to information that meets all the requirements for classification . . . but which, as a result of negligence, time constraints, error, lack of opportunity or oversight, has not been marked as classified information."[20] The forms themselves were not revised, however, and the published clarification failed to meet the objection that the term "classifiable" would deter officials from communicating nonclassified information to the Congress and to the public out of

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[19] H.R. Conf. Rep. No. 498, 100th Cong., 1st Sess. 1179 (1987). The importance of the conference report in understanding the intent of the two Houses is enhanced by the absence of an earlier report by a committee in either House.

[20] 52 Fed. Reg. 28,802 (Aug. 3, 1987) (to have been codified at 32 C.F.R. § 2003.20(h)).

fear that other officials would later decide that the material should have been classified.[21]

On December 21, 1987, the Director of the Information Security Oversight Office again revised the rules governing Form 189 in an effort to answer the concern about after-the-fact classification. The new regulation limited the prohibition in Form 189 against disclosure of "classifiable" information to "(a) [u]nmarked *classified* information, including oral communications; and (b) *unclassified* information that meets the standards for classification and is in the process of a classification determination."[22] In promulgating this change, administration officials took the first step toward resolving the controversy about the reach of the secrecy agreements, but they failed, as they had failed to do in August, 1987, to take the other necessary step of issuing revised forms that contained the limiting definition. The following day, December 22, 1987, Congress enacted section 630 to prohibit the enforcement of agreements which include in their text the word "classifiable."

The revision of the government's secrecy agreements occurred in two steps in 1988. First, prior to the district court's judgment invalidating section 630, the Director of Central Intelligence, on March 18, 1988, issued Form 4355 to replace Form 4193. The new form omits the term "classifiable." Instead, it defines the information covered by the agreement to be information that "involves or derives from intelligence sources or methods and is classified or is in the process of a classification under the standards of Executive Order 12356 or other Executive order or stat-

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[21] One union argued to the district court that "any definition outside the scope of the form itself could be changed by administrative fiat. It is plaintiff's position that the term 'classifiable' cannot be made legally sound by attempts to define it as something other than what it is on its face." Opposition to Defendants' Motion to Dismiss at 5 (filed Nov. 20, 1987), *National Federation of Federal Employees v. United States*, C.A. No. 87-2284 (D.D.C.).

[22] 52 Fed. Reg. 48,367 (Dec. 21, 1987) (to have been codified at 32 C.F.R. § 2003.20(h)) (emphasis in original).

ute." J.A. 54, ¶ 1. Then, following the July 28, 1988 ruling of the district court in the companion cases that had remained below,[23] the Director of the Information Security Oversight Office issued Form 312 to replace Form 189. As with the new SCI agreement, Form 312 omits the term "classifiable" and applies only to information that is classified or, if unclassified, "meets the standards for classification and is in the process of a classification determination." [24] Appropriated funds are no longer being used "to implement or enforce" any nondisclosure agreement that "contains the term 'classifiable.'" The major problem which Congress sought to solve in enacting section 630 has been remedied.[25]

This Court adheres to the principle that "[u]nder Article III of the Constitution, [it] may only adjudicate actual, ongoing controversies." *Honig v. Doe*, 108 S.Ct. 592, 601 (1988). Accordingly, "[t]he present rule in federal cases is that an actual controversy must exist at all stages of appellate review, not merely at the time the complaint is filed." *Id.* at 607 (Rehnquist, C.J., concurring).[26] Because there is no " 'reasonable expectation that the same complaining party would be subjected to the same action again,' " [27] the exception to the mootness rule for cases

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[23] Motion to Affirm at 4a-24a, *reprinting National Federation of Federal Employees v. United States*, 695 F. Supp. 1196 (D.D.C. 1988), *appeals docketed*, Nos. 88-5402 & 88-5404 (D.C. Cir.).

[24] J.A. 60; 53 Fed. Reg. 38,279 (Sept. 29, 1988) (to be codified at 32 C.F.R. § 2003.20(h)).

[25] Current executive branch employees who had signed Form 189 or Form 4193 have been notified of the narrowing of the definition of "classifiable," Brief of Appellants at 20, and of their opportunity to replace their old agreements with new ones which omit the disputed term. 53 Fed. Reg. 38,279 (Sept. 29, 1988) (to be codified at 32 C.F.R. § 2003.20(b)).

[26] *But see id.* at 608 (Rehnquist, C.J., concurring) (proposing exception to mootness rule when supervening event takes place after probable jurisdiction is noted or certiorari is granted). The issuance of Form 312 without the term "classifiable" occurred prior to the noting of probable jurisdiction.

[27] *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)).

that are "capable of repetition, yet evading review," *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), is unavailable.

The President's statement that section 619 (section 630's successor) "will be considered of no force or effect unless and until the ruling of the District Court is reversed by the Supreme Court" [28] furnishes no occasion to continue to litigate about the deleted term "classifiable." It is unlikely that the President intended to draw a distinction between the vacating and reversing of the district court's judgment; either result would leave intact the statute enacted by the Congress. Moreover, the notice published by the Director of ISOO explained that Form 312 had been issued without the term "classifiable" because it was "a preferred means" to deal with the ambiguities that had been perceived in the prior form. 53 Fed. Reg. 38,278 (Sept. 29, 1988). There is no basis for believing, and no suggestion has been made, that either the Director of ISOO or the Director of Central Intelligence would now discard that "preferred means" and revert to the ambiguities which had led to litigation and legislation. The judgment of the district court, insofar as it rests on subsection 2 of section 630, should be vacated as moot pursuant to *United States v. Munsingwear*, 340 U.S. 36 (1950).

3. No Dispute About Any Other Part of Section 630 Is Ripe for Review

Although disputes about the application of the remaining parts of section 630 may occur, no ripe controversy about subsections 1 and 3–5 exists to warrant a disposition of the merits of this appeal now that the principal dispute under subsection 2 over the term "classifiable" has been mooted.

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[28] 24 Weekly Comp. Pres. Doc. 1189 (Sept. 26, 1988); *see* Brief of Appellants at 20.

a. Potential Disagreements Over the Knowledge Requirement in Subsection 1 Do Not Present a Ripe Controversy

Under subsection 1 of section 630, no funds may be used to implement or to enforce nondisclosure agreements unless the agreements apply to information (apart from marked classified information) that is "unmarked but known by the employee to be classified; or, unclassified but known by the employee to be in the process of a classification determination." [29] While the new nondisclosure forms are not limited expressly to unmarked information that is "known" by an employee to be classified or in the process of classification, the forms describe a consistent duty of employees to learn about the status of information. If during the remainder of this fiscal year this duty is enforced in a way which engenders the uncertainty that section 630 was designed to eliminate, a ripe controversy might be presented about subsection 1. Until then an adjudication about the subsection's meaning and constitutionality would be premature.

The replacement forms that were issued after enactment of section 630 impose a duty on federal personnel to inquire when they are uncertain about the classification status of information. Form 4355 requires a signer to agree not to disclose to an unauthorized person information in the process of classification "that I know to be

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[29] As a preliminary matter, the congruity between the President's directive and the words utilized by Congress in subsection 1 makes it difficult to discern in them the basis for a constitutional conflict. The report on which the President based NSDD 84 eschewed any interest in addressing the "compromise of classified information through negligence." *1983-84 House Judiciary Comm. Hearings*, *supra* note 6, at 166; *see also id.* at 170-71. The President directed that persons who have "knowingly" made unauthorized disclosures be denied future access to classified information. J.A. 13 (§ 2(e)). The language employed by the Congress in subsection 1—that secrecy agreements may govern only marked classified information or unmarked information that is "known" by an employee to be classified or in the process of a classification determination—follows naturally from the President's order establishing the secrecy agreement program.

SCI." J.A. 55 (§ 3). An employee who has signed the agreement has the responsibility to "consult" with departmental authorities "to ensure that I know whether information or material within my knowledge or control that I have reason to believe might be SCI, or related or derived from SCI, is considered by such Department or Agency to be SCI." *Id.* Form 312 imposes the similar duty on each employee who signs it "that if I am uncertain about the classification status of information, I am required to confirm from an authorized official that the information is unclassified before I may disclose it" to unauthorized persons. J.A. 67 (§ 3).

Based on their understanding that "[t]hrough the actual knowledge requirement, Congress sought to ensure that agencies would not resurrect the uncertainty surrounding the term 'classifiable,' " [30] appellants are concerned about an ISOO guideline that a person "may" be liable for disclosing classified information only if he or she knows or "reasonably should know" that the information is classified or in the process of classification determination.[31] But any immediate problem of uncertainty about the phrase "reasonably should know" has been ameliorated by describing to employees the specific measures which they should take: they should "consult" (Form 4355) or "confirm" (Form 312) when they are in doubt about the classification status of information.

Neither the purpose of section 630 nor the text of subsection 1 suggests that Congress intended to deny to the executive the power to require employees to take reasonable steps to learn whether information is classified or is undergoing a classification review, as long as they are not required to speculate about the actions of government

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[30] Brief of Appellants at 36. We agree with appellants that subsection 1 was passed in aid of subsection 2 and should be interpreted and applied in conjunction with that subsection's ban on the term "classifiable."

[31] *Id.* at 19–20, *citing* 53 Fed. Reg. 38,279 (Sept. 29, 1988) (to be codified at 32 C.F.R. § 2003.20(h)(3)).

classifiers.[32] The forms that have been issued since the enactment of section 630 seek both to eliminate uncertainty and to discourage willful ignorance by describing the duty of employees to ascertain the status of information with which they have been entrusted. Any interpretative problem that may be posed by a duty to "consult" or "confirm" is unlike the one that persuaded the Congress to prohibit the term "classifiable." The Congress's principal objection to the term "classifiable" was that it required employees to predict whether government officials would decide that previously unclassified material should have been classified. In contrast, a duty to "confirm" or "consult" obliges employees only to ascertain the present classification status of information; speculation is not required.

Neither Form 312 nor Form 4355 presents on its face an issue about compliance with subsection 1. Although a ripe controversy might be presented if, in the implementation of these forms, the uncertainty that section 630 sought to eliminate reemerges, no concrete dispute about

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[32] Indeed, one of the plaintiffs below, the American Federation of Government Employees, AFL–CIO, has advised this Court that "it is far from clear that § 630 is intended to preclude the Executive from taking disciplinary action against an employee who unknowingly but carelessly discloses unmarked information in the process of a classification determination." Brief for the American Federation of Labor and Congress of Industrial Organizations and the American Federation of Government Employees, AFL–CIO as *Amici Curiae* Supporting Appellants at 25–26.

The concern has been expressed that a duty to "consult" or "confirm" "will force would-be whistleblowers to have to ask their superiors about classification determinations. This would act to stop the whistleblower." *Congress and the Administration's Secrecy Pledges: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 21 (1988) (statement of Rep. Boxer). However, ISOO's regulations provide that nondisclosure agreements "do not supersede the provisions of section 2302, Title 5, United States Code, which pertain to the protected disclosure of information by Government employees." 53 Fed. Reg. 38,279 (Sept. 29, 1988) (to be codified at 32 C.F.R. § 2003.20(g)).

subsection 1 is unavoidably presented on the record that is now before the Court.

b. Neither Is the Potential Issue Under Subsection 3, About Prior Authorization for Disclosures to Congress, Ripe for Review

In ruling that section 630 is unconstitutional, the district court mentioned neither subsections 1 nor 2 but held that "[p]articularly offensive to the need for judicially manageable standards are subsections (3) through (5) of section 630." [33] We agree with the Solicitor General that the principal questions to be decided, if the merits are reached, are whether subsection 3 precludes the executive branch from requiring that officers and employees obtain authorization from their superiors before communicating classified information to members of Congress, and, if it does, whether subsection 3 is constitutional. *See* Motion to Affirm at 22-28.

There is no need, however, to decide that issue in this case. First, there is nothing on the face of the agreements which impels a resolution of these questions. The agreements permit disclosure to persons "authorized" to receive information, J.A. 55 (Form 4355, § 3); J.A. 67 (Form 312, § 3), but do not describe who is authorized. The agreements do not purport to exclude members of Congress from the universe of authorized persons. The question whether the approval of superior officials is required for the submission of classified information to the Congress implicates policies that are extrinsic to the nondisclosure agreements and would take this litigation far from its present field.

Second, both sides to this litigation have acknowledged the lack of concreteness pertaining to this issue in the

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[33] J.S. 26a. The district court did not indicate what it meant in this context by "judicially manageable standards." Normally, the "lack of judicially discoverable and manageable standards," *Baker v. Carr*, 369 U.S. 186, 217 (1962), would persuade a court to avoid, rather than to decide as it did here, an important question about the allocation of constitutional authority between the political branches.

record below. Thus the appellants have advised this Court that "[i]t would be particularly inappropriate for the Court to delimit the parameters of the rights protected by Section 630 here because this case does not concern a specific disclosure made by a federal employee to a Member of Congress." Brief of Appellants at 47. The Solicitor General has agreed that "the Court does not have before it any concrete instance in which an employee has sought but been denied authorization to disclose information to a Member of Congress or has been disciplined or denied further access to classified information because he made such a disclosure without seeking or obtaining prior approval." Motion to Affirm at 27.

Appellants argue persuasively that "[r]ather than decide the respective rights of Congress and the Executive Branch in a vacuum, the Court should leave resolution of future disputes to political negotiations between the branches or to judicial determinations in concrete settings where political accommodation does not fully resolve the conflict." Brief of Appellants at 47. The Solicitor General, with equal persuasiveness, argues that equitable relief should be withheld because the "profound separation-of-powers concerns" that have been raised are being presented "in an exceedingly abstract and speculative context." Motion to Affirm at 27.

Third, vacating the district court's judgment about subsections 3 through 5 for lack of ripeness would be consistent with that court's dismissal of a claim that the confidentiality agreements conflict with the Lloyd - La Follette Act, 5 U.S.C. § 7211. Motion to Affirm at 21a. Section 7211 provides that "[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." On dismissing that claim, the district court held that plaintiffs must allege that they "have disclosed or intend to disclose some classified or classifiable information to Congress and have been

threatened with enforcement of the nondisclosure agreements. No such allegation appears in the complaint." Motion to Affirm at 22a.

The objective of subsection 3 is to protect rights that are established or recognized under section 7211 "to petition or communicate with Members of Congress." Just as the district court held that a claim under section 7211 should allege a specific impairment of an employee's right to communicate with the Congress, so a claim under subsection 3, which was enacted to implement section 7211, should allege actual communications to the Congress and actual threats to enforce nondisclosure agreements. The principle underlying the district court's dismissal of the claim under section 7211 establishes that the court should have avoided, for a commensurate lack of ripeness, ruling on the constitutionality of any aspect of section 630 beyond the now mooted issue under subsection 2.

Dismissal for lack of ripeness of these facial challenges to the form agreements is required by the principle that "[t]he power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." *United Public Workers v. Mitchell*, 330 U.S. 75, 89–90 (1947). Particularly in light of "the political nature of the questions presented" about the access of the executive and legislative branches to, and control over, information relating to national security and foreign policy, "the prior proceedings in the federal courts must be vacated, and the complaint dismissed." *Goldwater v. Carter*, 444 U.S. 996, 1006 (1979) (Rehnquist, J., concurring).

4. Vacating the Judgment Will Also Serve to Avoid Involving the Court in the Resolution of Open Political Issues Between the Representative Branches

Vacating the judgment below on grounds of mootness and unripeness not only would be faithful to this Court's

general principles of restraint but also would serve, in this extraordinary context, to avoid involving the Court in the resolution of significant political matters that are best left to the processes of continuing communication and accommodation between the representative branches.

For example, consideration of whistleblower legislation in the 101st Congress has already commenced as a consequence of President Reagan's pocket veto of the Whistleblower Protection Act of 1988.[34] Congress and the new administration also may grapple with unresolved questions about requirements for executive reporting to the Congress of anticipated covert intelligence operations. Last year the Senate passed a bill to assure more timely notification to the Congress of covert operations.[35] During the Senate hearings on the bill, the administration stated constitutional objections based on its views of the exclusive powers of the President concerning national security.[36] In response, the Senate Select Committee on

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[34] 24 Weekly Comp. Pres. Doc. 1377 (Oct. 31, 1988); 135 Cong. Rec. S23 (daily ed. Jan. 3, 1989) (referral to Senate Committee on Governmental Affairs of message from the President transmitting proposed Whistleblower Protection Act of 1989); *id.*, S278-83 (daily ed. Jan. 25, 1989) (statements on introduction of S. 20, Whistleblower Protection Act of 1989). That measure concerns civilian whistleblowers. Last year the Congress enacted, and the President signed, strong military whistleblower protection as part of the National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 846, 102 Stat. 1918, 2027 (1988).

[35] Intelligence Oversight Act of 1988, S. 1721, 100th Cong., 2d Sess., 134 Cong. Rec. S2249 (daily ed. March 15, 1988) (passage). The bill implemented a recommendation made by the congressional committees which investigated the Iran-Contra affair. S. Rep. No. 100-216 and H.R. Rep. No. 100-433, at 423. The House Permanent Select Committee on Intelligence and Committee on Foreign Affairs reported comparable legislation, H.R. Rep. No. 705, Pts. 1 & 2, 100th Cong., 2d Sess. (1988), but the House did not complete action on the measure.

[36] *Oversight Legislation: Hearings on S. 1721 and S. 1818 Before the Senate Select Comm. on Intelligence*, 100th Cong., 2d Sess. 81-106, 127-52, 157-91 (1988) (testimony and materials submitted by Ass't Att'y Gen. Charles J. Cooper).

Intelligence reported to the Senate its views that the shared nature of presidential and congressional authority with respect to national security supports the constitutionality of legislation that requires the provision of information to the Congress. S. Rep. No. 276, 100th Cong., 2d Sess. 19-25 (1988). These are the very considerations that are offered by both sides in opposition to, or in defense of, section 630. A judgment by this Court on those issues in the highly generalized circumstances of this litigation could have a considerable impact on significant matters that the Congress and the President should be resolving directly with each other.

CONCLUSION

The judgment of the district court should be vacated in part as moot and in part as unripe.

Respectfully submitted,

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FEBRUARY 1989.

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No. 87-2127

In the Supreme Court of the United States

AMERICAN FOREIGN SERVICE ASSOCIATION, ET AL.,
APPELLANTS

v.

STEVEN GARFINKEL, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF AND MOTION OF THE SPEAKER AND LEADERSHIP GROUP FOR LEAVE TO FILE BRIEF AMICI CURIAE OUT OF TIME

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE SPEAKER AND LEADERSHIP GROUP FOR LEAVE TO FILE BRIEF AMICI CURIAE OUT OF TIME

For the following reasons, the Speaker and Leadership Group respectfully move for leave to file the attached brief *amici curiae.*

In this appeal, the Executive Branch has challenged an act of Congress. This Court has "long held that Congress is the proper party to defend the validity of a statute," *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919, 940 (1983), when the Executive Branch challenges the statute's constitutionality. In such cases, the Speaker and Leadership Group ("House parties") is the normal mechanism by which the House of Representatives presents its institutional interest. *See, e.g., Morrison v. Olson,* 108 S. Ct. 2597 (1988).

Pursuant to Rule 36.2 of this Court, an *amici curiae* brief presenting the position set forth herein was due to be filed on December 29, 1988. However, that date was in the final days of the One Hundredth Congress. The House parties, like the Senate, appropriately awaited the start

and organization of the One Hundred First Congress prior to filing. The merits of the challenge to this statute, if reached, would raise major questions of the separation of powers in matters of national security, concerning which deliberations were appropriate after the organization of the Congress.

Counsel for the parties have been advised of, and provided in advance with draft copies of, the accompanying brief in advance of the printing of this motion and brief, allowing appellees thereby to review those arguments in their preparations for filing their own brief, which is not yet due. Neither the appellants nor the appellees object to the filing of the brief *amici curiae*. Accordingly, the House parties move for leave to file the attached brief *amici curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Interest of the *Amici Curiae*	1
Summary of Argument	3
Argument	5
I. The Court Should Hold That the Case No Longer Presents a Basis To Rule, or Else Vacate the District Court's Ruling and Remand for Reconsideration	5
A. *Legislative Background*	5
B. *Absence of a Concrete Case*	12
II. Congress May Legislate About Government Information, Particularly About Programs To Withhold It From Congress Itself, and Most Particularly May Decide Whether To Appropriate for Such Programs	16
A. *Congress and the Executive Share Authority Over National Security Generally*	16
B. *Congress May Legislate Regarding Government Information Particularly About Withholding From Congress Information About Waste and Wrongdoing*	19
C. *Congress Decides Whether to Withhold Appropriations*	26
Conclusion	30

TABLE OF CASES AND AUTHORITIES

Cases:	
Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1978)	13
Alejandrino v. Quezon, 271 U.S. 528 (1926)	11
American Foreign Service Association v. Garfinkel, 688 F. Supp. 671 (D.D.C. 1988)	10

Page

Cases—Continued

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Ashwander v. Tennessee Valley Authority, 297 U.S. 288, *reh'g denied*, 297 U.S. 728 (1936) 4, 12
Barenblatt v. United States, 360 U.S. 109, *reh'g denied*, 361 U.S. 854 (1959) 22
Bowsher v. Synar, 478 U.S. 714 (1986) 1, 17
Buckley v. Valeo, 424 U.S. 1 (1976) 17
CIA v. Sims, 471 U.S. 159 (1985) 21
Cole v. Young, 351 U.S. 536 (1956) 17
Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) 17
County of Los Angeles v. Davis, 440 U.S. 625 (1979) 12
Dames & Moore v. Regan, 453 U.S. 654 (1981) 16
Department of Navy v. Egan, 108 S. Ct. 818 (1988) 21
Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) 22
Environmental Protection Agency v. Mink, 410 U.S. 73 (1973) 20
Gelston v. Hoyt, 6 U.S. (3 Wheat.) 246 (1818) 28
Gilligan v. Morgan, 413 U.S. 1 (1973) 14
Golden v. Zwickler, 394 U.S. 103 (1969) 12
Goldwater v. Carter, 444 U.S. 996 (1979) 13
Gravel v. United States, 408 U.S. 605 (1972) 26
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 25
Helstoski v. Meanor, 442 U.S. 500 (1979) 1
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Page

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Page

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Page

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In the Supreme Court of the United States

No. 87-2127

AMERICAN FOREIGN SERVICE ASSOCIATION, ET AL., APPELLANTS,

v.

STEVEN GARFINKEL, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INTEREST OF THE AMICI CURIAE

The Speaker and Leadership Group of the House of Representatives ("House Amici")[1] respectfully submit this brief as *amici curiae* in support of the position that the case should be dismissed, or the decision of the district court vacated and remanded for reconsideration, on the ground that it no longer presents a concrete controversy; if the merits are reached, that district court deci-

[1] The Speaker and Leadership Group are the Honorable Jim Wright, Speaker of the House of Representatives; the Honorable Thomas S. Foley, Majority Leader; and the Honorable Tony Coelho, Majority Whip.

Participation by the Speaker and Leadership Group is the standard mechanism by which the House of Representatives pursues its institutional interests in litigation. *See, e.g., United States Army Corps of Engineers v. Ameron, Inc.*, 109 S. Ct. 297 (1988); *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986); *Bowsher v. Synar*, 478 U.S. 714 (1986). The Speaker of the House has also represented the institutional interests of the body in various litigation in this Court. *See, e.g., United States v. Helstoski*, 442 U.S. 447 (1979); *Helstoski v. Meanor*, 442 U.S. 500 (1979).

sion should be reversed and the Congress' authority to enact the challenged Act of Congress should be sustained. After the Congress adopted section 630 of the Treasury, Postal Service and General Government Appropriations Act, 1988, Pub. L. 100-202, 101 Stat. 1329 (1987), a moratorium on agency use of certain nondisclosure forms, a single District Judge struck down that statute. The district court held that the Congress' role is so inconsequential, and the President's authority so preeminent, in the area of national security information, that the President can act in contravention of a duly enacted statutory provision. Yet, the same district court then proceeded to conclude that the President's use of those nondisclosure forms violated the Constitution.

The district court grievously erred in ignoring the statute's constitutional basis: this Court's many precedents recognizing Congressional authority, and rejecting the notion of exclusive Presidential authority, in the national security area. However, that ultimate question of the allocation of powers between the branches is not properly before the Court in this case. While the district court broke loose from the constraints of normal jurisprudential considerations to espouse its theory of constitutional law, this Court may well recognize that the current dispute does not presently give rise to a case or controversy. Rather, the controversy over the Information Security Oversight Office's (ISOO) 1983-89 "anti-leak" or "nondisclosure" program challenged by the plaintiffs has been the subject of significant give and take between the executive and legislative branches. This dispute regarding the precise language to be used in restricting the speech of employees who have access to sensitive information lacks sufficient focus, particularly with ISOO's retreat from the most objectionable aspects of that program concerning "classifiable" information. The courts should permit the ongoing dialogue between the political branches to proceed until a satisfactory conclusion is reached. Not yet is

this Court required to demarcate the essential powers and limits of the political branches.

Although the Court should dispose of the case on these jurisdictional grounds, if, the posture of the case notwithstanding, the Court should decide to reach the basic question of constitutionality, the Court should reject the President's claim to unilateral uncontrollable power. This Court has consistently recognized that in the area of national security the President and the Congress share both responsibility and authority. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The Court should not deny to Congress its rightful place in the determination of national security policy. The President's opposition to the moratorium should not have been expressed by defiance of the law, but rather should have been expressed within the legislative process. The Constitution, and the political process, provide the President with many weapons, including the right to veto legislation which contain provisions he disfavors. The President's role in national security matters, though great, neither precludes the legislative branch from exercising its legislative authority nor excuses the executive from obeying the law. This notion of shared power lies at the heart of our constitutional system and has been upheld by this Court whenever challenged.

Consistent with recently developed and judicially accepted practice, both Houses of Congress appear as *amici* by their appropriate legal representatives to offer their institutional positions regarding this case. Although this case need not require the Court to reach the question of the Act's constitutionality, if the Court should address the issue its answer should be clear and unequivocal. If the district court's substantive decision is considered it should be rejected.

SUMMARY OF ARGUMENT

This Court should hold that the current dispute does not, at present, give rise to a case or controversy, because the significant give and take between the executive and

legislative branches has resolved, or will resolve, so large a part of the issues as not to leave a concrete basis for ruling. After Judge Gasch himself ruled that restrictions about "classifiable" information in nondisclosure forms were unconstitutional, ISOO finished discarding the forms not funded by section 630 and substituted new ones without the most objectionable feature. The controversy underlying Judge Gasch's ruling on the statutory moratorium became obsolete once the discarding of the forms secured that moratorium's primary purpose. The remaining issues about the moratorium are at present unfocused and do not currently warrant resolution of major constitutional issues.

To proceed with the case now would violate the cardinal axiom of judicial restraint in challenges to Acts of Congress. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347, *reh'g denied*, 297 U.S. 728 (1936) (Brandeis, J., concurring). The precedents support either dismissing the case, or vacating and remanding. *See, e.g., Kremens* v. *Bartley*, 431 U.S. 119, 134-35 (1977) (remanding for reconsideration rather than resolving "unfocused" constitutional claim); *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 587-9 (1972). Dismissal finds particularly strong support in the inappropriateness of needlessly judicializing the separation of powers in the national security context. "[T]here will be time enough [later] to consider that problem in a factual context," *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 445 (1977).

If, nonetheless, the Court reaches the constitutional challenge urged by the Executive Branch, it should recognize the constitutional and historically-confirmed authority of Congress in this context. The Court could only strike down an Act of Congress by "disabling the Congress from acting upon the subject" and "sustain[ing] exclusive presidential control" over the field. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637-638 (1952) (Jackson, J., concurring). This Court recognizes a "premier role which both Congress and the Executive play in

this field." *Japan Whaling Assn.* v. *American Cetacean Society*, 478 U.S. 221, 230 (1986).

Far from being disabled from acting on this subject, Congress has several independent sources for its authority. Statutory "regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its [executive] autonomy." *Nixon v. Administrator of General Services*, 433 U.S. at 445. Congress has historically protected the right of executive employees to bring it information on waste and wrongdoing, as part of Congress' broad oversight power. *McGrain v. Daugherty*, 273 U.S. 135 (1927).[2] Congress' power of the purse vests in it alone the decision on funding an "anti-leak" program, as confirmed by the Framers' views and the nation's history. A ruling against Congress' power would be a staggering blow to the system of checks and balances. This Court should decline to judicialize this subject, or to create an exclusive enclave of executive power, "for what is at stake is the equilibrium established by our constitutional system," *Youngstown*, 343 U.S. at 638.

ARGUMENT

I. THE COURT SHOULD HOLD THAT THE CASE NO LONGER PRESENTS A BASIS TO RULE, OR ELSE VACATE THE DISTRICT COURT'S RULING AND REMAND FOR RECONSIDERATION

The reasons why the present dispute does not currently give rise to a case or controversy begin with six years of significant give and take between the executive and legislative branches.

A. *Legislative Background*

In 1983, "after a number of embarrassing newspaper stories about plans of the Reagan administration," President Reagan announced he deemed himself " 'up to his

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[2] The 1912 Lloyd-LaFollette Act confirmed permanently that the "right of employees . . . to furnish any information to either House of Congress, or to . . . a Member thereof may not be interfered with or denied." 5 U.S.C. §7211. Recent history has reconfirmed Congress' authority to assure direct access to it of those with vital information.

keister' " in leaks and promulgated National Security Decision Directive 84 (NSDD-84), J.A. at 14, on March 11, 1983.[3] NSDD-84 massively expanded the use of nondisclosure agreements, previously limited to the intelligence agencies, to the large bureaucracies which handle routine military procurement and similar matters.[4] J.A. at 14.

Contrary to the Solicitor General's suggestion that the 1983 directive "did not generate significant public opposition" (Motion to Affirm at 19), within a year, hearings and reports on the directive by four different Congressional committees documented the large scale of the program [5] and widespread public criticism.[6] Congress react-

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[3] A task force had reported on the matter a year earlier on March 31, 1982, but the President's issuance of his March 11, 1983 directive responded to the more contemporaneous events. The quotes are from the historical background report, House Comm. on Post Office and Civil Service, *Federal Polygraph Limitation and Anti-Censorship Act of 1984*, (H.R. 4681), H.R. Rep. No. 961, 98th Cong., 2d Sess. 8 (1984) (Part 1) [hereinafter *Anti-Censorship Act Report*].

[4] NSDD-84 also expanded the use of prepublication review: the required submission of relevant statements to government clearance and censorship, which had previously been limited to the Central Intelligence Agency (CIA) and the National Security Agency (NSA).

[5] The General Accounting Office (GAO) testified in 1983 that approximately four million persons with access to classified information would be required to sign a nondisclosure agreement, and approximately 127,000 with access to SCI would be required to sign a prepublication review nondisclosure agreement. House Comm. on Government Operations, *Legislation Needed to Curb Secrecy Contracts*, H.R. Doc. No. 991, 100th Cong., 2d Sess. 3 (1988) [hereinafter *1988 Congressional Report*].

[6] *See Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary and the Subcomm. on the Civil Service of the House Comm. on Post Office and Civil Service*, 98th Cong., 1st & 2nd Sess. (1983 and 1984); *National Security Decision Directive 84: Hearings Before the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. (1983); *Review of the President's National Security Decision Directive 84 and the Proposed Department of Defense Directive on Polygraph Use: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Oper-*

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ed with an appropriations-based moratorium, much like the Act of Congress (Section 630) now being challenged.[7] Accordingly, in 1984, the President suspended portions of NSDD-84, with a promise to work with the Congress on the matter.[8]

In 1986-7, ISOO decided to continue pushing its nondisclosure initiative,[9] with forms including provisions creating a concept of punishment for disclosing "classifiable" information, whatever that might be, as distinct from classified information. *1988 Congressional Report* at 5. Under this massive and expensive government-wide pro-

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ations, 98th Cong., 1st Sess. (1983); House Comm. on Government Operations, *The Administration's Initiatives to Expand Polygraph Use and Impose Lifelong Censorship on Thousands of Government Employees,* H.R. Rep. No. 578, 98th Cong., 1st Sess. (1983); House Comm. on Post Office and Civil Service, *Anti-Censorship Act Report;* House Committee on the Armed Services, *Federal Polygraph Limitations and Anti-Censorship Act of 1984 (H.R. 4681),* H.R. Rep. No. 961, 98th Cong., 2d Sess. (1984) (Part 2).

[7] Section 1010, 97 Stat. 1017 (1983), Pub. L. No. 98-164. Senator Mathias, the author of the amendment, described it on the floor of the Senate thus:

> Our amendment would require the administration to follow the familiar formula of caution: stop, look, and listen. The administration should stop implementation of the censorship program.
>
> . . . The Administration should look at the alternatives which have been suggested in both Senate and House hearings. . . . The administration should listen to comments and suggestions of both Houses of Congress. . . . Mr. President, this amendment would freeze the status quo until April 15, 1984.

129 Cong. Rec. 14283-84 (1983).

[8] Letter from Robert McFarlane to Chairwoman Schroeder (March 20, 1984), *reprinted in Anti-Censorship Act Report* at 55. ("Rather than resume the legislative debate on the merits of NSDD 84, we would prefer to work cooperatively with Congress to develop a mutually-acceptable solution to this problem.")

[9] The Solicitor General suggests incorrectly that Congress assailed the initiative at the "last minute" from a drive to interfere "categorically." Motion to Affirm at 20. It was ISOO that launched a late effort.

gram, 2.5 million present and former government employees and 1.1 million defense contractor employees were being required to sign nondisclosure forms.[10] In fresh Congressional hearings, numerous official, expert and public witnesses criticized these new forms and their potential impact on government employees' communications with Congress about military waste and wrongdoing.[11]

Congress responded, as in 1983, with a temporary appropriations-based moratorium, as part of the government-wide continuing resolution for Fiscal Year 1988. Section 630 of Pub. L. No. 100-202, 100 Stat. 1329 (1987). Whereas the Solicitor General suggests that Congress was bent on "categorically" (Motion to Affirm at 16) interfering with Presidential prerogatives over classified information, the reality is that Congress refused to fund only specific aspects of ISOO's program. First, and foremost, the statutory moratorium refused to fund the two particularly flawed ISOO forms. The moratorium explicitly preserved the President's authority to continue acting in this context, just not with those two ISOO forms.[12]

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[10] *See Congress and the Administration's Secrecy Pledges: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 160 (1988) (GAO testimony) [hereinafter *1988 Hearings*]. In addition, "453,000 current and former employees, excluding the CIA and NSA, have signed SCI agreements [requiring prepublication review]." *Id.* at 166. As former CIA Director Stansfield Turner testified, based on prepublication review of his own book, "the CIA is seriously short of staff to conduct the prepublication reviews," and "the bureaucracy to handle hundreds of thousands of people's writings would be immense if it were not to be very slow." *Id.* at 104-105.

[11] *Classified Information Nondisclosure Agreements: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. (1987) [hereinafter *1987 Hearings*].

[12] It provided that "No funds appropriated in this resolution or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government . . ." The moratorium stated th t no funds shall be used to "implement or

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Second, the moratorium precluded forms equivalent to the two named ones from controlling "classifiable" information, by refusing to fund:

> any other nondisclosure policy, form or agreement if such policy, form or agreement (1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or unclassified but known by the employee to be in the process of a classification determination; [or] (2) contains the term 'classifiable.'

Id. § 630 (1) and (2). Finally, the moratorium precluded funding for any agreement which impeded rights to communicate with Congress.[13] The conference report accompanying the statutory moratorium summed up the legislative intent to prod further discussion between the two branches.[14]

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enforce" the covered contracts, but goes on to state: "*Provided*, that nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)–(5)." *Id.*

[13] It precluded funding for any agreement which impeded:

> the rights of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress; (4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress; (5) imposes any obligations or invokes any remedies inconsistent with statutory law.

Id. § 630(3)–(5).

[14] "The purpose of this amendment is to address serious concerns of the Congress about the obligations imposed on government employees by nondisclosure agreements. . . . The amendment identifies several of these concerns and would bar the enforcement of such questionable obligations during fiscal year 1988. . . . It is the intent of the authors of this amendment, during the coming year, to examine the entire issue of nondisclosure agreements, including prepublication review and make appropriate responses to Executive Branch policy in this area as needed." *Conference Report to Accompany H.J. Res. 396*, H.R. Conf. Rep. No. 1398, 100th Cong., 1st Sess. 1179 (1987).

94-408 O - 89 - 2

Meanwhile, the instant litigation reached the point of rulings on cross-motions for summary judgment. In a peculiar reversal of order, the single-judge district court's two rulings first addressed the highest-level questions of the constitutionality of the enacted moratorium, and only thereafter addressed whether there was any need for the constitutional ruling. In the first ruling, on May 27, 1988, *American Foreign Service Association v. Garfinkel,* 688 F. Supp. 671 (D.D.C), Senior District Judge Oliver Gasch did not address how much of the moratorium was at issue, beginning his analysis with the naked assumption: "*Assuming* that the Executive's actions since enactment of section 630 do not comply with the requirements of that legislation," Judge Gasch would determine whether "section 630 unconstitutionally impinges on the President's discretion to regulate access to and disclosure of national security information." J.S. at 22a.[15] His decision simply recited sweeping generalizations and a half-dozen judicial opinions on the President's role in national security, J.S. at 22a–27a.

Two months later, when Judge Gasch focused on the actual concrete controversy over the use of the term "classifiable" in the nondisclosure agreements—Congress' primary concern in the moratorium—he agreed with Congress that the Executive Branch's reliance on the concept of "classifiable" information was itself unconstitutional. J.A. at 93. The Administration had responded to the statutory moratorium by starting to replace the prohibited forms with new forms omitting the objectionable term "classifiable." [16] The new forms made no explicit mention of any objectionable requirement of pre-authorization by superiors before employees could give information to Con-

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[15] The district court relegated the fact that the Executive Branch had dropped the flawed forms prohibited by the moratorium to a footnote. *Id.* at n.16.

[16] On March 18, 1988, the Administration replaced Standard Form 4193 with a new contract (SF 4325) for those with access to Sensitive Compartmented Information (SCI) which does not use the term "classifiable." J.A. at 58–62.

gress. After Judge Gasch's ruling that struck down Section 630, ISOO finished dropping the "classifiable" provisions.[17] Judge Gasch thereby vindicated the primary purpose of the moratorium, but only after the self-contradicting action of gratuitously striking down an Act of Congress as unconstitutional.

Faced with the expiration of the one-year statutory moratorium, the House Committee on Government Operations held important hearings on the issue on August 10, 1988, receiving official, public, and expert criticism of Judge Gasch's decision. Chairman Brooks "f[ou]nd it incredible that a court has concluded that a law—voted on by the Congress and signed by the President—is an inappropriate method to set the balance between national security and first amendment concerns that these contracts raise. . . ." *1988 Hearings* at 2.[18] With the size and cost

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[17] ISOO replaced SF 189 (and 189-A) on September 29, 1988 with a new form (SF 312) which does not cover "classifiable" information. 53 Fed. Reg. 38,278-80 (1988) (to be codified at 32 C.F.R., Part 2003). Plaintiffs and defendants may well raise subsidiary questions regarding such matters as the period during which agencies continued to require the signing of old forms or had them signed with a mere addendum, and the asserted inadequacy of efforts retrospectively to cure past problems by notice or otherwise. Such questions do not provide a sufficient reason to question the constitutionality of an Act of Congress when its primary purpose has been sustained. *See, e.g., Alejandrino v. Quezon*, 271 U.S. 528, 535 (1926) (refusing to let "incidental issue" of backpay prevent dismissal when "main question . . . has become moot").

[18] Admiral Stansfield Turner, former director of the CIA, testified that the nondisclosure agreements were "not critical" to our national security and that "other than in the CIA and NSA, we have gotten along well for a long time without them." *1988 Congressional Report* at 14. *See also* S. Turner, *Secrecy and Democracy* 290 (1985) ("Congress should establish the period during which former employees must submit their writings for clearance [under the censorship contract]"). The House Committee on Government Operations adopted the aforecited *1988 Congressional Report* affirming that "it is within Congress' authority to legislate restrictions and controls on nondisclosure agreements." *Id.* at 20.

of the program growing,[19] reenactment of the appropriations moratorium was strongly supported,[20] and was in fact enacted the following month. Section 619, Pub. L. No. 100-440, 102 Stat. 1721. Notably, the new moratorium refused to fund the old forms, cited by number, dropped by ISOO during the moratorium, but did not mention the new forms. Congress thus clearly aimed, not at categorically wiping out all the President's action in this context, but at temporarily not funding particular ISOO forms and specified abuses while continuing to study the issue.

B. *Absence of a Concrete Case*

The Court refuses generally to rule on moot cases, *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), or on cases lacking "sufficient immediacy and reality." *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). Beyond that, the Court requires the highest level of concreteness in cases, like this, in which one side or the other facially challenges an Act of Congress. The Court applies a "rigid insistence that the jurisdiction of federal courts is limited" when presented with challenges to "the validity of an act of Congress." *Ashwander v. Tennessee Valley Authority*, 297 U.S. at 345 (Brandeis, J., concurring).

Accordingly, the Court has repeatedly either held that it would not consider abstract challenges to Acts of Congress, or at least would remand for reconsidering whether they remained concrete.[21] *See, e.g., Kremens v. Bartley,*

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[19] *See 1988 Hearings.* According to the GAO testimony in the first several months of 1988, 43,000 additional SF 189 contracts and 6,000 SF 4193 contracts were signed despite the moratorium. *Id.* at 165-166.

[20] *1988 Hearings* at 15, 83, 189 (exchanges by key Members).

[21] *See also Watson v. Buck*, 313 U.S. 387, 402 (1941) ("A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured.")

431 U.S. 119, 134-35 (1977) (remanding for reconsideration rather than resolving "unfocused" constitutional claim); *Socialist Labor Party v. Gilligan,* 406 U.S. 583, 587-9 (1972). "[T]here will be time enough [later] to consider that problem in a factual context," *Nixon v. Administrator of General Services,* 433 U.S. at 445.

This Court demonstrates the highest caution of all in addressing separation of powers controversies in national security contexts. Throughout the early 1970s, the Court declined to decide numerous cases arising out of the Indochina War, including cases, like this one, concerning appropriations-constraining moratoriums. *See Holtzman v. Schlesinger,* 484 F.2d 1307, 1312-13 n.3 (2d Cir. 1973) (collecting cases), *cert. denied,* 416 U.S. 936 (1974). Lower courts have read this Court's precedents as reflecting a particular reluctance to resolve suits for injunctive relief regarding national security. *Adams v. Vance,* 570 F.2d 950 (D.C. Cir. 1977). In a striking 1979 example, the Court vacated for lack of jurisdiction the separation of powers challenge to the termination of the Taiwan Treaty. *Goldwater v. Carter,* 444 U.S. 996 (1979).

In light of these principles, and with the primary purpose of the challenged Act of Congress vindicated, the case no longer presents a live question. Judge Gasch created the illusion of a concrete case only by proceeding in reverse order with the case. First he struck down the Act of Congress; then he declared unconstitutional the practices it has refused to fund. With those rulings viewed in orderly sequence the case presents no reason for reaching the question of the Act's constitutionality. *Surely, the courts do not intend to rule on the Congress' obligation to fund unconstitutional programs which have ended.*

Subsidiary issues about the moratorium simply do not present enough of a concrete and live case for a ruling like Judge Gasch's. Of those subsidiary issues, the one which came closest to any substance was Section 630's refusal to fund forms impairing the rights of government employees to inform Congress through secure channels.

See Section 630 (3). For all the Solicitor General's claims about Executive power to interfere with government employees providing information to Congress, the nondisclosure forms do not incorporate those assertions in any explicit way. Rather, they simply require that classified information be provided only to persons "authorized to receive it." J.A. at 60. Whatever abstract pronouncements the Solicitor General may make, Congress understands its own Members to be "authorized to receive" such information through secure channels from government employees,[22] and ISOO has not promulgated a form explicitly directing government employees not to inform Congress. Thus, ISOO's nondisclosure forms do not bring an issue to the point of concreteness needed for a ruling on the constitutionality of an Act of Congress.

In the motion to affirm, the Solicitor General correctly noted that "the Court does not have before it in this case any concrete instance in which an employee . . . has been disciplined or denied further access to classified information because he made such a disclosure [to a Member of Congress] without seeking or obtaining prior approval." Motion to Affirm at 29. While there is much to disagree with in the Solicitor General's arguments on the merits, this point about the lack of a concrete case is well taken. The absence of a case over a concrete individual, the absence of an explicitly worded prohibition in the nondisclosure forms, and the statutory moratorium's limited wording, all reflect that the basis is not present in this Court for such a ruling.[23]

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[22] As discussed below, that understanding draws on two centuries of active Congressional involvement in oversight of national security, and on Congressional involvement today in many of the most sensitive of such matters, including intelligence matters.

[23] *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) (holding that courts should not decide important constitutional questions on less than an "adequate and full-bodied record"); *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973) (declining "the assumption of a continuing judicial review of substantive political judgments entrusted expressly to the co-

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Until now, this Court has repeatedly cited Congressional oversight as a major reason why it can stay out of such controversies. An example is one of the main comparable cases of the past two decades raising the issue of chilling of First Amendment rights in the intelligence context, *Laird v. Tatum*, 408 U.S. 1 (1972). In *Laird*, Army Intelligence established a data-gathering system which surveilled domestic civilian political activity, and civilians brought suit for injunctive relief. This Court found the case insufficiently concrete for decision, not wanting "the federal courts [to be] virtually continuing monitors of the wisdom and soundness of Executive action" in that intelligence context. *Id.* at 15. Instead, the Court held that "such a role is appropriate for the Congress acting through its committees and the 'power of the purse,' " *id.*, and the Court stated its respect for the "concerns of the . . . Legislative Branch[] in response to disclosure of the Army surveillance activities." *Id.* When Judge Gasch reached out and held that he would pass upon issues concerning the "anti-leak" program, while disabling Congress from doing so, he turned that philosophy of judicial restraint on its head. Legislative Branch oversight, and use of the power of the purse, were supplanted by judicial action. The consequence would be precisely what *Laird v. Tatum* predicted, namely, that those expecting sympathetic judicial treatment would forsake the halls of democracy and bring their political disputes over these issues to the life-tenured branch.

Few cases pose such broad, formless separation of powers issues as this one. On the one hand is a Congressional refusal to fund; on the other, a claim of inherent Presidential prerogative. On the one hand are the power of the purse and the power to probe; on the other, the power of the sword. On the one hand is a Congressional invocation of its authority for two centuries to legislate regarding government information, to secure information

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ordinate branches of government"); *Laird v. Tatum*, 408 U.S. 1, 15 (1972); *Rescue Army v. Municipal Court*, 331 U.S. 549, 584–85 (1947).

for itself from government employees, and to decide what programs to fund; on the other, Presidential powers relating to classification. Deciding the constitutionality of this Act of Congress means that extensive fields of interaction hitherto left to Congress and the President will be judicialized. A whole area of national security into which the courts have not ventured will be invaded. All this will be done without anything even remotely resembling an adequate record.[24] Under the circumstances, the Court should not rule on momentous constitutional issues.

II. CONGRESS MAY LEGISLATE ABOUT GOVERNMENT INFORMATION, PARTICULARLY ABOUT PROGRAMS TO WITHHOLD INFORMATION FROM CONGRESS ITSELF, AND MOST PARTICULARLY MAY DECIDE WHETHER TO APPROPRIATE FOR SUCH PROGRAMS

A. *Congress and the Executive Share Authority Over National Security Generally*

If the Court reaches the constitutional challenge against the Act of Congress urged by the Executive Branch, it should recognize the constitutional and historically-confirmed authority of Congress in this context. As noted by *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637-638 (1952) (Jackson, J., concurring), which furnishes the test for such separation of powers challenges (*see Dames & Moore v. Regan,* 453 U.S. 654, 669 (1981)), "Presidential powers are not fixed but fluctuate,

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[24] The case concerns no specific incident, and therefore no particular penalized individual, no item of information provided to (or withheld from) Congress, no specific Congressional entity granted or denied information, and not even any explicit language in the nondisclosure statement on key points. Not only did Judge Gasch hold no trial or even an evidentiary hearing, deciding the case on conclusory agency affidavits appended to summary judgment motions, but as discussed above, he completely ignored the six-year history in which Congress had held hearing after hearing, issued reports, held floor debates, and thereby developed its own extensive legislative record. That legislative record, having received no study below, does not come to this Court having been at all analyzed judicially.

depending upon their disjunction or conjunction with those of Congress." *Youngstown*, 343 U.S. at 635. In challenging an Act of Congress, the Executive's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 637. This Court would strike down an Act of Congress only on the ground of such "exclusive presidential control" and "by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution." *Id.*, at 635–38. *See Cole v. Young*, 351 U.S. 536, 558 n.20 (1956).

Consequently, Acts of Congress struck down by the Court on separation of powers grounds have all concerned Congressional post-enactment mechanisms—such as legislative vetos, legislative appointments, or legislative removals—found to violate specific provisions of the Constitution.[25] This Court has *never* overturned *any* statute on the separation of powers theory embraced by the district court that the *subject* was so exclusively reserved for the President as to disable the Congress from acting. When the district court took the step of striking down this statute on the grounds that the President had such exclusive power that Congress could not refuse to appropriate for

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[25] Statutes which have been struck down by this Court on separation-of-powers grounds have been determined to have run afoul of specific textual constitutional prohibitions. *See, e.g., Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 946–47 (1983) (requirements for bicameralism and presentation to the President under article I, § 7, which "the draftsmen took special pains to assure . . . could not be circumvented"); *Buckley v. Valeo*, 424 U.S. 1 (1976) (the appointments clause under Article II is a "cognate provision[ ] of the document."); *Bowsher v. Synar*, 478 U.S. 714 (1986) (assignment of executive functions to an officer removable by Congress). *Compare Morrison v. Olson*, 108 S. Ct. 2597 (1988); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986); *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987).

this program, J.S. at 27a, it acted absolutely without a shred of historical precedent.[26]

In the realm of national security, the Constitution simply does not provide the President with the "conclusive and preclusive" role required to completely disable Congress from "acting upon the subject." Only two years ago, this Court recognized the "premier role which both Congress and the Executive play in this field." *Japan Whaling Assn. v. American Cetacean Society*, 478 U.S. at 230. In that case, like this one, the Solicitor General urged broad Executive powers on this Court, invoking dicta out of context from cases involving clear Presidential prerogatives (such as recognition of foreign governments). The Speaker and Bipartisan Leadership Group appeared as amicus curiae in the case, properly presenting to the Court the large role of Congress even in international relations. Soundly, the Court accepted the amicus position, with its emphasis that "both Congress and the Executive" play that role.

It is the Congress—not the President—which the Constitution empowers "to declare war," art. I, § 8, cl. 1; to "regulate Commerce" including foreign commerce, art. I, § 8, cl. 3; "to raise and support armies," art. I, § 8, cl. 12, "to provide and maintain a navy," *id*, cl. 13, "to make rules for the Government and regulation of the land and naval forces," *id.*, cl. 14, and "to provide for organizing, arming and disciplining, the militia," *id.*, cl. 16.[27] Of course, the President possesses his own powers regarding national security, such as serving as "Commander-in-Chief" [28] and his duty to "take Care That the Laws be

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[26] *See 1988 Congressional Report; see also 1988 Hearings*, 1113-165 (statements on unprecedented nature of district court decision by Michael Glennon, Professor of Law, University of California, Davis and Harold Bruff, Professor of Law, the University of Texas).

[27] *See* U.S. Const., art. I, § 8, cl. 18 (Necessary and Proper Clause).

[28] This power is circumscribed by the appropriations power. It "would amount to nothing more than the supreme command and direction of the military and naval forces . . . while that of the British

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faithfully executed." [29] Art. II., § 2, cl. 1 and § 3. However, these manifestly do not render the subject in question exclusively Presidential in nature, but merely show that where matters of war, armies, and security are concerned, there is a shared realm in which both Congress and the President act.

B. *Congress May Legislate Regarding Government Information, Particularly About Withholding From Congress Information About Waste and Wrongdoing*

Congress has manifest authority to regulate information and document handling by federal employees. The statutory "regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its [executive] autonomy." *Nixon v. Administrator of General Services,* 433 U.S. at 445. That case upheld the Presidential Recordings and Materials Preservation Act, which regulated the papers of former President Richard Nixon, against a separation of powers challenge because

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King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the constitution under consideration, would appertain to the legislature." *The Federalist*, No. 69 at 449 (A. Hamilton) (emphasis in original). As Justice Jackson indicated, "While Congress cannot deprive the President of the command of the Army and Navy, only Congress can provide him an Army or Navy to command." And Congress, because it is empowered to make rules for the "Government and Regulation of army and naval forces" may "impinge . . . to some unknown extent . . . upon even command functions." *Youngstown*, 343 U.S. at 644.

[29] The "Executive Power" is not taken as a grant in bulk of other powers. *Youngstown*, 343 U.S. 640–41 (Jackson, J., concurring). The "faithful execution" clause, contrary to claims by the Executive, does not constitute a positive grant of power for the President, but instead a limit on what the Executive may do with its own powers. *Kendall v. United States ex. rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838); *Youngstown*, 343 U.S. at 587 (majority opinion); *id.* at 610 (Frankfurter, J., concurring); *id.* at 646 (Jackson, J., concurring); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974). *See Ameron, Inc. v. U.S. Army Corps of Engineers*, 610 F.Supp. 750, 755 (D.N.J. 1985) (history of clause), *aff'd*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 109 S. Ct. 297 (1988).

the Court did not believe the Act prevented the Executive Branch from "accomplishing its constitutionally assigned functions." *Id.*, at 443.

Two years later, in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), the Court confirmed that "classified" or national security information is not insulated from Congressional control. Discussing the Executive Branch's classification system, the Court indicated "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject *only* to whatever limitations the Executive privilege [regarding Presidential confidential communications] may be held to impose upon such Congressional ordering." *Id.* at 83 (emphasis added).[30]

No short list could do justice to the extensive precedent for Congressional regulation of government information. As noted in *Nixon v. Administrator of General Services*, 433 U.S. at 445:

> of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. See, *e.g.*, the Freedom of Information Act, 5 U.S.C. § 552 (1970 ed. and Supp. V); the Privacy Act of 1974, 5 U.S.C. § 552 (a) (1970 ed., Supp. V); the Government in the Sunshine Act, 5 U.S.C. § 552b (1976 ed.); the Federal Records Act, 44 U.S.C. § 2101 *et seq.*; and a variety of other statutes, *e.g.*, 13 U.S.C. §§ 8–9 (census data); 26 U.S.C. § 6103 (tax returns).

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[30] The executive privilege, to the extent (if any) it applies to the Congress, would not extend throughout the Executive Branch's millions of employees. *See United States v. Nixon*, 418 U.S. 638 (1974) (executive privilege only for Presidential communications).

Such Congressional regulation necessarily extends to classified records and information, and there is a comprehensive network of legislation for classified information.[31] The classification system is impotent without that network of legislation, for Congressional statutes—not an administrative system—establish the criminal offenses for security violations, their conduct and intent standards, the judicial procedures, the weight to be given to the fact of classification, and the punishments for such offenses.[32] When civil liberties and national security must be balanced in this context, "[t]he need for a legislative judgment is especially acute," *United States v. Robel,* 389 U.S. 258 (1967); *Kent v. Dulles,* 357 U.S. 116, 128 (1958). *See New York Times Co. v. United States,* 403 U.S. 713 (1971).[33]

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[31] *See, e.g.,* the Freedom of Information Act, 5 U.S.C. § 552(b)(1); the Privacy Act, 5 U.S.C. § 552a; the Central Intelligence Agency Information Act, Pub. L. No. 98-447, 98 Stat. 2209 (*see CIA v. Sims,* 471 U.S. 159, 168 (1985)); the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801-1811; the Classified Information Procedures Act, 18 U.S.C. § 1-16; and above all the espionage laws, 18 U.S.C. 792, *et seq.*

[32] Similarly, the Freedom of Information Act records that Congress has set the test for withholding of documents from the public: whether documents are "in fact properly classified," 5 U.S.C. § 552b(1), with *de novo* judicial review where appropriate. The Executive Branch's high-flying citations to the discussion in *Department of the Navy v. Egan,* 108 S. Ct. 818 (1988), conspicuously omit the key qualification that deference to the Executive occurs "unless Congress specifically has provided otherwise." *Id.* at 625.

[33] In *New York Times,* Justice White, in his concurrence, examined in detail the laws governing espionage, concluding "that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information", 403 U.S. at 740 (citations omitted). *See also id.* at 718 (Black, J., concurring) (criticizing the Executive for "not even attempt[ing] to rely on any Act of Congress" and acting "even when the representatives of the people in Congress have adhered to the command of the First Amendment"); *id.* at 722 (Douglas, J., concurring) ("Thus, Congress has been faithful to the command of the First Amendment in this area.")

Moreover, Congress can legislate regarding executive programs aimed at withholding information from Congress itself. As this Court has recognized, Congress's ability to oversee and investigate the executive branch is an essential attribute of the legislative function.[34] History provides the best guide to this authority, and strongly confirms it. Starting in 1792, the House of Representatives voted to create a special committee to investigate the Army's disastrous military expedition against Indian tribes in the Northwest Territory.[35] The St. Clair Investigation examined numerous witnesses and documents that would be classified today, concerning procurement waste, military readiness, and the communication from Secretary of War Knox to Major General St. Clair, conveying President Washington's orders. *Congress Investigates* at 11-13.

From that first Congressional investigation until today, it is reported that "Congressional Committees have examined the conduct of all the wars in which the United States has engaged except the Spanish-American War. . . ." Galloway, *The Investigative Function of Congress*, 21 Am. Pol. Sci. Rev. 47, 48 (1927).[36] Most recently,

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[34] *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (Congress's investigatory powers are "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); *McGrain v. Daugherty*, 273 U.S. 135, 175 (1926); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

[35] A. Schlesinger, *Congress Investigates: 1792-1974* 7 (1975) [hereinafter *Congress Investigates*]; T. Taylor, *Grand Inquest: The Story of Congressional Investigations* 35 (1955). James "Madison, who had taken an important part in framing the Constitution only five years before, and four of his associates in that work, were members of the House of Representatives at the time, and all voted for the inquiry." *McGrain v. Daugherty*, 273 U.S. at 161.

[36] *See* R. Berger, *Executive Privilege: A Constitutional Myth*, 44, n. 171 (1974) (To cite only a few early examples, the House scrutinized the Treasury Department (1800 and 1824), the territorial government of Mississippi (1800), the War Department (1809 and 1832), the conduct of General James Wilkinson (1810), government clerks generally

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select committees of the Senate and House held exhaustive hearings into intelligence operations of the Iran-Contra affair.[37]

During this time, programs to block providing of government employee information to Congress have received decisive responses. Around the turn of the century, the Theodore Roosevelt and Taft Administrations imposed a series of gag orders on federal employees prohibiting them from communicating with Congress on grievance [38] or other matters.[39] Congressional response was intensely

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(1818), the Post Office (1820 and 1822), the Bank of the United States (1832 and 1834), the New York Customs House (1839), the conduct of Captain J.D. Elliott commanding a naval squadron in the Mediterranean (1839), the Commissioner of Indian Affairs (1849), the Secretary of Interior (1850), the Smithsonian Institution (1855). In the meantime, the Senate had [l]ooked into General Andrew Jackson's conduct of the Seminole Wars in Florida (1818), the Internal Revenue Bureau (1828), the Post Office (1830), and John Brown's Raid at Harper's Ferry (1859).

Similarly, a joint Senate-House Committee was established for oversight during the Civil War. *Congress Investigates*, p. 76–77. As in the St. Clair investigation, that Committee reviewed supplies, transportation, morale, treaties, and command functions involved in the prosecution of the war by the Army. *Id.* at 76–94.

[37] *Report of the Congressional Committees Investigating the Iran-Contra Affair*, S. Rep. No. 216 & H. Rep. No. 433, 100th Cong., 1st Sess. (1987).

[38] The Roosevelt gag order prohibited communicating to Congress "either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence in their own interest any other legislation." S. Spero, *Government As Employer* 123 (1948). The first gag order was issued on January 31, 1902. Exec. Order No. 163, *reprinted in* 48 Cong. Rec. 5223 (1912). It was reissued on January 25, 1906 and amended to include the independent agencies as well as the executive departments.

[39] In 1909, President Taft supplemented the Roosevelt orders by extending the prohibition from communicating with Congress about job grievances to cover "Congressional action of any kind" and by adding a prohibition against employees " 'Respond[ing] to any request for information from either House of Congress, or any Committee of either House of Congress, or any member of Congress except through and as authorized by the head of his department.' " Executive Order No. 1142 of November 26, 1909, *reprinted in* 48 Cong. Rec. 7513 (1912).

negative.[40] The House voted 132 to 1 for a provision in the postal appropriations bill for 1913 to allow postal workers to communicate to Congress.[41] As Representative Lloyd warned, "[i]f no Government employee is permitted to speak, excepting through his department chiefs and the department chief through the Cabinet officer . . . then there is no possible way of obtaining information." *Id.* at 10671. The Senate expanded the House provision, limited to postal workers, to guarantee all civil servants the absolute right to communicate with Congress, which became section 6 of the Postal Appropriations Act of 1913, better known as the Lloyd-LaFollette Act:

> The right of persons employed in the Civil Service of the United States, either individually or collectively to petition Congress or any member thereto, *or to furnish information to any House of Congress or to any Committee or Member thereof*, shall not be denied or interfered with.

5 U.S.C. § 7211 (emphasis added).

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[40] Congress believed the gag orders to be an affront to the Constitution and the "sacred rights" of federal employees under the First Amendment. 48 Cong. Rec. 4493 (1912) (Remarks of Rep. Moon). *See also id.* at 5080 (Remarks of Rep. Rouse), 5203 (Remarks of Rep. Prouty), 5626 (Remarks of Rep. Fowler), and 4238 (Remarks of Rep. Blackman) (gag orders represented "suspension of the Constitution."). Further, the gag orders were described as "un-American and unrighteous," *id.* at 5223 (Remarks of Rep. O'Shaunessy), "obnoxious" and "galling," *id.* at 5235 (Remarks of Rep. Buchanan), "un-American, undemocratic, despotic, and cruel." Appendix to 48 Cong. Rec. 154 (speech of Rep. Kinkian). Government employees were "handicapped, shackled, and gagged" by the Administration's orders. *Id.* at 5157 (Remarks of Rep. Evans) and "chocked and tied hand and foot," *id.* at 4656 (remarks of Rep. Calder). The Administration was a "tyranny" and "petty despotism." *Id.* at 5157 (Remarks of Rep. Rouse).

[41] 48 Cong. Rec. 5639 (1912).

The Civil Service Reform Act of 1978,[42] its legislative history,[43] and the focus on protecting particular employees [44] make clear that protection of government employees who inform Congress necessarily applies to all information, whether classified or not. Congress has been explicit in protecting the government employees it depends upon for important national security information.[45]

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[42] The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1114 includes specific provisions to protect government whistle-blowers from agency reprisals for their disclosures of illegal, improper, or wasteful government activities. *See* 5 U.S.C. § 2302(b)(8). Although Congress recognized the executive's classification system by not protecting such disclosure to the public, disclosures of such information to appropriate governmental officials are protected. *Id.* Further, the statute preserves Lloyd-LaFollette: "This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress." 5 U.S.C. § 2302(b).

[43] "[B]y placing limitations on the kinds of information any employee may publicly disclose without suffering reprisal, there is no intent to limit the information an employee may provide to Congress or to authorize reprisal against an employee for providing information to Congress. Neither title I nor any other provisions of the Act should be construed as limiting in any way the rights of employees to communicate with or testify before Congress." *Conference Report to Accompany the Civil Service Reform Act of 1978*, H.R. Conf. Rep. No. 1717, 95th Cong, 2d Sess. 132 (1978).

[44] One impetus for the statute was the case of Ernest Fitzgerald, who testified before a Congressional subcommittee in November of 1968 about a two billion dollar overrun on procurement of the C-5A transport aircraft, and was subsequently harassed by the Department of Defense. *See Hearings Before the Subcomm. on Economy in Government of the Joint Economic Committee*, 90th Cong., 2d Sess. 200-202 (1968); *Hearings Before the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess, 331-335, 529-551, 571-580 & 714-745 (1978) (testimony by Fitzgerald and others leading to the 1978 act); 1987 Hearings* at 17-20, 27-32; *Harlow v. Fitzgerald, 457 U.S. 800 (1982).*

[45] Section 846 of the National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, 102 Stat. 1918, 2027 (protections for military employees who inform Congress amended to specifically cover disclosures of classified information). Federal employees' communications, not filtered through superiors, are of critical importance to Con-

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C. *Congress Decides Whether to Withhold Appropriations*

The Constitution confers on Congress the unfettered power to decide whether to withhold appropriations from a government program by providing that "No money shall be drawn from the Treasury, but in consequence of Appropriations made by law," U.S. Const., art. I, § 9, cl. 7. Parliament's same power of the purse, the antecedent of this authority, included the power to curb Executive initiatives in foreign affairs, defense, or intelligence by refusals to fund them,[46] and the Framers had most earnestly championed Congress's exercise of a similar power.[47]

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gress. *Gravel v. United States,* 408 U.S. 605, 630 (1972) (Stewart, J., dissenting in part) ("in preparing for legislative hearings, debates, and roll calls, a Member of Congress obviously needs the broadest possible range of information. Valuable information may often come from sources in the Executive Branch . . . [a]nd informants such as these may be willing to relate information to a Congressman only in confidence").

[46]

> The provision [appropriations clause of the Constitution] was framed against the backdrop of 150 years of struggle between the King and Parliament for control over the purse, often centering on military matters. In 1624 the House of Commons for the first time conditioned a grant of funds to the king. The Subsidy Act of that year prohibited the use of any military monies except for financing the navy, aiding the Dutch, and defending England and Ireland. Two years later Charles I attempted to wage war without popular support, but Parliament promptly denied him funds to conduct it. . . .

1988 Hearings at 145–46 (Statement of Professor Glennon) (footnotes omitted).

[47] While the appropriations power is not confined to foreign policy and security issues, *see The Federalist,* No. 58 (J. Madison) (the appropriations power represents "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure"):

> Meeting in Philadelphia in 1787, the Framers were well aware of the tradition of parliamentary power over the purse and its use to check unwanted 'national security' activities.

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Any notion that the President's powers override Congress's authority to withhold appropriations utterly defies the Framers' most basic doctrine of separation of powers: as George Mason stated it, "the purse and the sword should not be in the same hands." M. Farrand, 1 *The Records of the Federal Convention of 1787* at 144 (1937). This is the "most important single curb in the Constitution on presidential power." E. Corwin, *The Constitution and What It Means Today* 101 (1973 ed.).

Congress established from the first years of the Republic through the twentieth century that it would decide, by granting or withholding appropriations, whether to proceed with such programs as treaty implementation and military preparations.[48] As a leading commentator summed up the subsequent experience:

> Congress is free to refuse to appropriate funds required for the execution of treaties; it can snub the

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> . . . Madison considered it 'particularly dangerous to give the keys of the treasury, and the command of the army, into the same hands.' . . . Accordingly, the Framers chose, in the words of Jefferson, to transfer the war power 'from the executive to the legislative body, from those who are to spend to those who are to pay.'

1988 Hearings at 145–46 (Statement of Professor Glennon) (footnotes omitted). *See* Wolfson, *Is a Presidential Item Veto Constitutional?* 96 Yale L.J. 838, 841–44 (1987).

[48] E. Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations,* Ann. of the Am. Acad., Sept. 1953, at 1245, 1246–49. As military Chief of Staff Omar Bradley said, "Under our form of government, the military policy of the United States is shaped by Congress not by the Armed Forces . . . because . . . Congress controls the appropriations which in the final analysis . . . control the military policy. . . ." *Hearings on Military Functions, National Military Establishment Appropriations Bill for 1949 (Part 3),* House Comm. on Appropriations, 80th Cong., 2d Sess. 5, 14 (1948). *See* E. Huzar, *The Purse and the Sword: Control of the Army by Congress through Military Appropriations 1933–1950* (1950) (describing military appropriations provisions on organization, personnel, and finance). "Much more common in the military supply measures than affirmative legislation on [military] organizations have been limitations on appropriations." *Id.* at 211.

> President's requests for funds needed to finance long-range, large-scale military, economic, and technical assistance programs; it can provide authorizations and funds . . . contrary to the President's policies; it can deny or limit the amount of money which the United States can contribute to international organizations, either as regular annual contributions or as voluntary payments to operating programs; and it can deny funds to enable the United States to participate in international meetings and conferences.

Nobleman, *supra*, at 145–46.

This Court established early that the President's powers in wartime did not extend beyond statutory limitations. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246 (1818). One nineteenth century example of an appropriations law curb was the "posse commitatus" law in 1878, enacted as a provision on the Army appropriations bill.[49] That appropriation law provision established the fundamental legal division between the military and civilian realms which has endured ever since. Of course, even the limited intelligence operations in the era before World War II, like all government activities, responded to control by appropriations.[50]

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[49] In its current form, the law prohibits the "willful[] use [] [of] any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws," 18 U.S.C. § 1385.

[50] One prominent example was the predecessor to today's National Security Agency, the post-World War I "Black Chamber" which monitored diplomatic telegrams. As its commander described, it came into existence through funds "which Military Intelligence managed to obtain from Congress after taking some of the leaders into their confidence. I was told that there was a joker in the Department of State special funds: they could not legally be expended within the District of Columbia." *Final Report of the Senate Sel. Comm. to Study Governmental Operations with Respect to Intelligence Activities*, S. Rep. No. 755, 94th Cong., 2d Sess., Book VI 116–17 (1974). Another example was the World War II intelligence operation, the Office of Strategic Services ("OSS"), the directive of which stated that "all funds to operate

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The end of World War II brought a dramatic increase in the peacetime expenditure of appropriations for national security programs, including foreign aid, defense, and the newly expanded intelligence operations. Annual appropriations for these programs involved numerous Congressional decisions on whether to fund programs, with many such decisions framed as limitations on the funds provided in the bill. These include the fundamental charter for covert operations, the Hughes-Ryan Amendment of 1974:

> No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries . . . unless and until the President [makes a] finding . . . and reports, in a timely fashion . . . to the appropriate committees of the Congress. . . .

Pub. L. No. 93-559, § 32, 88 Stat. 1804 (1974); 22 U.S.C. § 2422 (emphasis supplied). Other examples of appropriation limitations in the defense context include the limitations of the early 1970's which forbade further American expenditures on the war in Indochina; the Clark Amendment, which forbade further expenditures on war in Angola; and the Boland Amendment, which forbade further expenditures on war in Nicaragua.[51]

OSS must come from Congress, primarily the House and Senate Appropriations Committees." *Id.* at 141-42.

Much is made by the Executive Branch of the use of confidential funds by Presidents for spy activity. *Totten v. United States*, 92 U.S. (2 Otto.) 105 (1875). Such arrangements simply reflect that Congress has established a confidential funding system, rather than any displacement of the appropriations power. L. Fisher, *Presidential Spending Power* 205-13 (1975) (Congressional establishment, oversight, and repeal of confidential funding systems from 1789 on).

[51] The Indochina War provisions are discussed in T.M. Franck & E. Weisband, *Foreign Policy by Congress* 13-31 (1979). The Clark Amendment was section 404 of Pub. L. No. 94-329, 90 Stat. 757 (1976), codified at 22 U.S.C. § 2293, repealed by section 811 of Pub. L. No. 99-83, 99 Stat. 264 (1985), codified at 22 U.S.C. § 2293 note; it is discussed in

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A judicial ruling striking down such an Act of Congress would have disastrous implications, for the Judiciary would then be called into any number of separation of powers disputes. Congress places appropriation limitations on the areas in which United States combat or covert operations may occur; executive agency interventionists may assert inherent power to override such limits. Congress establishes the military command structure, such as the unified joint commands, and prescribes reforms after procurement scandals; the military services may balk. Congress imposes restraints on intelligence agencies, such as concerning CIA operations domestically, or technical surveillance of domestic citizens; the intelligence agencies may want to shake off these shackles.

Until now, the courts have never overturned an appropriations statute by finding that it impermissibly restrains the President. Once this Court strikes one down, the agencies would find the undefined extent of inherent Executive power a sufficient basis for a limitless number of requests for the Judiciary to take on the governing of national security. A greater violation of judicial restraint, and a greater injury to the democratic system of checks and balances, than such a ruling, can hardly be imagined.

CONCLUSION

The Court should either hold that the case no longer presents a concrete basis for a ruling, or vacate the district court's decision and remand for reconsideration. However, if the Court reaches the merits, it should apply principles which leave Congress its proper and ample role.

T.M. Franck & E. Weisband at 46–55. There were a number of different Boland Amendments in the mid–1980s, discussed in *Report of the Congressional Committee Investigating the Iran-Contra Affair* at 395–405.

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